Supreme Court, U.S.
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No. 09-

In The
Supreme Court of the United States

ARTHUR C. WAGNER, JR., Individually
and for the benefit of Jean Marie Wagner,
Petitioner,

v.

LIVE NATION MOTOR SPORTS, INC.,
f/k/a SFX MOTOR SPORTS, INC., d/b/a
Clear Channel Entertainment-Motor Sports;
and Heartland Park Raceway, L.L.C.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

STEVE R. FABERT
Counsel of Record
DAVID R. COOPER
FISHER, PATTERSON, SAYLER
& SMITH, L.L.P.
3550 S.W. 5TH STREET
P.O. BOX 949
TOPEKA, KS 66601-0949
(785) 232-7761 (TELEPHONE)
(785) 232-6604 (FACSIMILE)
sfabert@fisherpatterson.com
dcooper@fisherpatterson.com
Counsel for Petitioner

February 25, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The decision of the U.S. Court of Appeals for the Tenth Circuit in this matter arbitrarily and capriciously deprived plaintiff of his constitutional right to trial by jury guaranteed by the 7th Amendment, and further deprived him of a property or liberty interest protected by state law in violation of the Due Process Clause of the 5th Amendment. The Court of Appeals disregarded its statutory obligation under 28 U.S.C.A. § 1652 to apply the clearly announced law of Kansas in deciding whether the evidence was sufficient to support the jury's verdict.

STATEMENT OF PARTIES

The case in which petitioner is a party in United States District Court for the State of Kansas is *Arthur C. Wagner, Jr., Individually, and Arthur C. Wagner, Jr., for the benefit of Jean Marie Wagner v. Live Nation Motor Sports, Inc., f/k/a SFX Motor Sports, Inc., d/b/a Clear Channel Entertainment-Motor Sports; and Heartland Park Raceway, L.L.C., Case No.: 05-CV-2336-KHV-JPO* (filed Aug. 2, 2005).

1. *Arthur C. Wagner, Jr., Individually, and Arthur C. Wagner, Jr., for the benefit of Jean Marie Wagner v. SFX Motor Sports, Inc., et al., Case No.: 05-CV-2336-KHV-JPO* (filed Aug. 2, 2005), appeal docketed, Case No. 07-3365 (10th Cir. Jan. 9, 2008).

Plaintiff/Appellee/Cross-Appellant: Arthur C. Wagner, Jr., Individually, and Arthur C. Wagner, Jr., for the benefit of Jean Marie Wagner

Defendant/Appellant/Cross-Appellee: Live Nation Motor Sports, Inc., f/k/a SFX Motor Sports, Inc., d/b/a Clear Channel Entertainment-Motor Sports; and Heartland Park Raceway, L.L.C.

2. *Arthur C. Wagner, Jr., Individually, and Arthur C. Wagner, Jr., for the benefit of Jean Marie Wagner v. SFX Motor Sports, Inc., et al., Case No.: 05-CV-2336-KHV-JPO* (filed Aug. 2, 2005), appeal docketed, Case No. 07-3366 (10th Cir. Jan. 8, 2008).

Plaintiff/Appellee/Cross-Appellant: Arthur C. Wagner, Jr., Individually, and Arthur C. Wagner, Jr., for the benefit of Jean Marie Wagner

Defendant/Appellant/Cross-Appellee: SFX Motor Sports, Inc., d/b/a Clear Channel Entertainment-Motor Sports

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PETITION FOR A WRIT OF CERTIORARI

ARTHUR C. WAGNER, JR. individually and for the benefit of Jean Marie Wagner respectfully petitions for writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals (App. A, 1a-22a) is reported at 586 F.3d 1237. Petitioner's Motion for Rehearing En Banc was denied by the Court of Appeals on December 7, 2009. (App. D, 81a-82a). The relevant District Court for the District of Kansas opinions are:

1. *ARTHUR C. WAGNER, JR. Individually and for the benefit of Jean Marie Wagner v. SFX Motor Sports, Inc., et al.*, (App. B, 23a-56a) which is reported at 460 F.Supp.2d 1263; and

2. *ARTHUR C. WAGNER, JR. Individually and for the benefit of Jean Marie Wagner v. SFX Motor Sports, Inc., et al.*, (App. C, 57a-80a) which is reported at 522 F.Supp.2d 1330.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Tenth Circuit sought to be reviewed was entered on November 13, 2009. A timely petition for rehearing *en banc* was filed on November 24, 2009. The order denying the motion for rehearing *en banc* was entered on December 7, 2009. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 and Rule 13.3, because it is being filed within 90 days of the entry of the order denying rehearing *en banc*. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. U.S.C.A. Const. Amend. 5.
   Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation of Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation.

2. U.S.C.A. Const. Amend. 7.
Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

3. 28 U.S.C.A. § 1652

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

Plaintiff Arthur Wagner was seriously and permanently injured during a motorcycle race run by defendants at Topeka, Kansas, when he struck an unprotected concrete barrier that should not have been present, and he and his motorcycle burst into flames. Racetrack workers made no attempt to douse the flames that consumed his clothing, despite being implored to help by witnesses.

Mr. Wagner sued the race promoter and racetrack operator (among others) under Kansas law to recover for his injuries and for his wife's loss of consortium. Jurisdiction in the district court was based

on complete diversity of citizenship, pursuant to 28 U.S.C. §1332.

The parties stipulated that the unprotected concrete barrier could have been relocated and would have been moved, if only Heartland Park had been asked to relocate it. The jury found that defendant SFX had acted wantonly in disregarding the threat posed by the barrier and/or in failing to respond properly to the crash and resulting fire. The jury found that defendant Heartland Park had not acted wantonly in failing to move the unprotected concrete barrier without being asked to do so by SFX. Judgment was entered for plaintiff against defendant SFX following a jury trial that resulted in a verdict for $2,585,867.53 of total damages.

A partial remittitur of damages was ordered at the request of defendant SFX, but motions seeking judgment as a matter of law or a new trial were denied. SFX appealed, and plaintiff filed a cross appeal to challenge the remittitur.

The U.S. Court of Appeals for the Tenth Circuit reversed the jury's verdict and the judgment of the district court outright and directed the entry of judgment for defendants as a matter of law. The Court of Appeals determined that the acts and omissions of SFX did not rise to the level of wanton conduct, even though two lower court judges and the jury had found more than sufficient evidence of wanton conduct to be present. That decision rendered the cross appeal moot.

REASONS FOR GRANTING THE PETITION

1. Certiorari must be granted to vindicate plaintiff's right to a trial by jury under the 7th Amendment.

This case presents an example of "blatant federal-court nullification of state law" of the sort prohibited by *Leavitt v. Jane L.*, 518 U.S. 137, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996), aggravated by the constitutional severity of the resulting impairment of plaintiff's rights. A clearly announced rule of state law, well understood by two lower court judges and another panel of the same Court of Appeals, has been ignored by three appellate judges who prefer to substitute an invented standard of law that is not recognized by the courts of any state. This Court should grant review because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

The decision of the U.S. Court of Appeals for the Tenth Circuit violated plaintiff's 7th Amendment right to a trial by jury in accordance with the common law, because the Court of Appeals substituted the personal judgment of the three members of the appellate panel concerning the persuasive value of the evidence for the considered judgment of the jury on a matter that was plainly an issue of disputed fact. Two lower court judges examined the evidence and determined that there was more than sufficient evidence to permit a jury to decide the case. Without concluding that either lower court judge had mistakenly comprehended or applied the admittedly controlling precedent of a prior

decision, the members of the panel chose to disagree with their evaluation of the sufficiency of the evidence. No rational explanation or excuse for disagreement was given, and the appeal was decided as it would have been if the matter had been entrusted to the Court of Appeals as finder of fact.

The decision of the Court of Appeals to set aside the judgment disregarded clearly identified evidence relied upon by both lower court judges in their decisions denying judgment as a matter of law. The court's statutory and constitutional obligations to decide the case under Kansas law as previously announced, rather than under a hypothetical standard that the appellate court wished the law to be, were disregarded without justification under Kansas law. Because the evidence heard by the jury was undoubtedly sufficient under all prior precedent to support a verdict for plaintiff, it was error of constitutional magnitude to decide the case based on the idiosyncratic views of the appellate panel instead.

2. **Certiorari must be granted to vindicate plaintiff's rights to Due Process under the 5th Amendment.**

Plaintiff had a protected property interest in the judgment entered in the lower court. Those rights were arbitrarily and capriciously nullified by the Court of Appeals' unjustified application of its version of the law to the facts of record.

Under Kansas law a tort plaintiff has a vested property right in existing rules of law that cannot

lawfully be impaired through modification of rules of law without affording due process. This property interest exists even before the liability has been reduced to judgment. See ***Resolution Trust Corporation v. Fleischer***, 257 Kan. 360, 892 P.2d 497 (1995). Under Kansas law the operator of a race track has a legal duty to maintain proper protective barriers to prevent injury to business invitees in the event of a crash. See ***Marshall v. Heartland Park Topeka***, 274 Kan. 294, 49 P.3d 501 (2002). SFX Motor Sports, Inc. contractually assumed the duty to conduct the race safely in its track rental agreement with Heartland Park. Kansas law permits recovery of tort damages for breach of a contractual duty relating to safe operation of a race. The condition of the barriers surrounding the track was therefore the legal responsibility of defendant SFX Motor Sports, Inc.

The Court of Appeals invented a new principle of law that had never been contemplated by Kansas courts, and then applied that newly discovered principle in an arbitrary and irrational manner to conclude that the evidence of wanton disregard of plaintiff's safety was insufficient. Kansas law permits a finding of wanton negligence whenever circumstantial evidence establishes that the defendant either actually knew or should have known of a risk of serious harm, but then took no affirmative steps to materially reduce the risk of that harm. Passive inaction is sufficient to establish wanton conduct under Kansas law, according to ***Hayes Sight & Sound, Inc. v. ONEOK, Inc.***, 281 Kan. 1287, 136 P.3d 428 (2006), and ***Cerretti v. Flint Hills Rural Electric Co-op. Ass'n***, 251 Kan. 347, 366, 837 P.2d 330 (1992). Kansas law permits a finding of wanton conduct in respect of

one wrongful act even though other wrongful acts of the defendant might fall short of wanton conduct. See *Hawkinson v. Bennett*, 265 Kan. 564, 606-607, 962 P.2d 445, 475 (1998).

The Court of Appeals panel ruled that plaintiff failed to present sufficient evidence to avoid judgment as a matter of law, even though his evidence was superior to the evidence used to establish precisely the same claims in *Wolfgang v. Mid-American Motorsports, Inc.*, 898 F.Supp. 783, 788 (D.Kan. 1995) *aff'd* 111 F.3d 1515 (10th Cir. 1997), a case which has been recognized as an exemplary decision and has been cited as authority scores of times by the 10th Circuit Court of Appeals. The panel opinion in this case did not seek to distinguish *Wolfgang* or explain why it was not controlling precedent on the issue of plaintiff's burden of proof, and inexplicably refused to follow that precedent. The conflict can only be resolved by the Court of Appeals sitting *en banc*, because no panel of the Court has the authority to reverse a prior published decision on the merits. See *Thompson v. Weyerhaeuser Co.*, 582 F.3d 1125 (10th Cir. 2009); *United States v. Hernandez-Rodriguez*, 352 F.3d 1325, 1333 (10th Cir. 2003). Circuit Courts of Appeal are not free to ignore their own rules, and arbitrarily decide a case as though the rule can be amended on a whim. See *Hollingsworth v. Perry*, __U.S.__, 130 S.Ct. 705 (2010).

Both in their District Court briefs and in their appellate briefs, all parties agreed that the *Wolfgang v. Mid-American Motorsports, Inc.* case was the precedent that governed the resolution of most of the issues on summary judgment and on post-trial motion

for judgment as a matter of law. Both the judge who decided the summary judgment motion and the trial judge agreed that the *Wolfgang* case was the single most relevant precedent establishing the substantive standard for liability and the minimal evidence needed to satisfy plaintiff's burden on proof. The published decisions denying summary judgment to defendants and denying the post trial motion for judgment as a matter of law acknowledged the obvious controlling relevance of the *Wolfgang* case. See *Wagner v. SFX Motors Sports, Inc.*, 460 F.Supp.2d 1263 (D.Kan. 2006) and *Wagner v. SFX Motor Sports, Inc.*, 522 F.Supp.2d 1330 (D.Kan. 2007).

The relevance of the *Wolfgang* case is obvious. Both cases involve traumatic burn injuries to professional racers suing the race promoters for wanton failure to take effective measures to put out the fire on their bodies that ensued when a crash occurred. The present case also involves severe and disabling additional impact injuries resulting from Mr. Wagner's collision with an unprotected concrete barrier that should not have been present. The facts in the present case are more egregious than those established in *Wolfgang*, because in that case there was at least a token effort to put out the fire, while here there was literally nothing done - Mr. Wagner was permitted to burn until the fuel from his ruptured fuel tank was fully consumed. The evidence employed in this case was more one-sided than the evidence in the *Wolfgang* case, because plaintiff's expert's testimony on the issues of wantonness and obviousness of the hazards was unrebutted.

Counsel for plaintiff carefully marshaled the evidence to be sure that the case presented was superior in every detail to the evidence that had been declared to be sufficient in the *Wolfgang* case. Because nothing has occurred to cast doubt on the continuing validity of the *Wolfgang* case as precedent, it would have been clear error for the lower court to grant judgment as a matter of law. It was similarly clear error for the panel in this case to ignore the unimpeached precedent of the *Wolfgang* case. *Wolfgang* is still a correct statement of Kansas law. Neither party sought to certify the controlling legal standard from *Wolfgang* to the Kansas Supreme Court. Defendants filed a motion to certify other issues to the Kansas Supreme Court, but did not seek to challenge the substantive test of liability or the burden of proof and instead limited their motion to subsidiary issues concerning alleged comparative fault defenses.

The panel failed to apprehend and apply the clearly controlling *Wolfgang* case. The decision references *Wolfgang* superficially while ignoring its importance. Judge Vratil, Magistrate Judge O'Hara, and all parties, obviously considered the case to be controlling but the panel did nothing to distinguish *Wolfgang* or explain why it did not control. If the panel had directly addressed the significance of *Wolfgang*, the obvious conclusion would necessarily have been that the lower court judges were correct to conclude that it was the controlling precedent. The failure to distinguish the *Wolfgang* case is strong evidence that the panel comprehended that it could not be distinguished in any rational way.

The panel overlooked substantial and overwhelming evidence when it concluded that plaintiff failed to offer sufficient evidence to meet the burden of proof of wanton conduct under Kansas law. The law does not require that the defendant expressly admit that a racer has been intentionally sacrificed like a gladiator to thrill the crowd. When a fairly obvious danger is present, and the defendant does no more than offer an ineffective and token response to the danger, liability is well proven under Kansas law. The witnesses who testified for SFX admitted that they had made a conscious but tragically erroneous decision to forego padding or moving the exposed concrete wall, which was in effect a confession of wantonness under prior Kansas cases like the *Hayes Sight & Sound, Inc. v. ONEOK, Inc.* and *Cerretti v. Flint Hills Rural Electric Co-op. Ass'n*, decisions, *supra*. They irrationally predicted that this accident could not happen, and they were wantonly wrong to do so. The panel's opinion fails to consider the facts in the light most favorable to the appellee as required by F.R.C.P. 50, and describes the evidence as defendants would have liked the jury to view it, not as they were free to do.

The reasoning employed in the panel's decision is not borrowed from any prior Kansas case. "Levels of risk" are not a part of the law of Kansas. There is no precedent for the conclusion that the promoter of a race can avoid liability merely by showing that some effort was made to protect racers against other hazards that were not involved in the accident or the injury. When a real risk exists, and is either actually known or fairly evident, a race promoter must do something effective to avoid harm from that risk.

Doing nothing, or hoping that efforts to protect against another risk will provide a shield against liability, will not suffice. There was substantial evidence of a failure to respond to a known or obvious risk, whether the analysis occurs on a general level or a specific level. The general risk of accidents at the unprotected barrier, located close to the fastest curve on the track, was ignored, as was the highly specific risk of allowing the racer to continue burning while the track workers stood idly by and watched it happen.

Even if the evidence had failed to establish wanton failure to remove or at least pad the concrete barrier, that fact would not excuse the wanton failure to do anything to put out the fire. Standing by passively and watching a fellow human being burn alive is ordinarily considered to be evidence of actual malice, not just wanton disregard. Even a total stranger deserves some effort to douse the flames that are consuming him. The direct testimony of one of the race workers who failed to put out the fire confirmed that neither he nor the only other worker who had a fire extinguisher did anything at all to douse the flames that covered Mr. Wagner. If that conduct does not rise to the level of wantonness, then there is no such thing as wanton conduct. The refusal of the Court of Appeals to acknowledge these damning facts is most disturbing, and strongly indicative of a desire to reach an arbitrary result that is unrelated to the facts of the case. It cannot be squared with the rule of *Hawkinson v. Bennett*, permitting a finding of wanton conduct as long as any wrongful omission met the test of conscious disregard, despite care in some other aspect of the case.

CONCLUSION

The petition for a writ of certiorari should be granted and the matter remanded to a different panel of the U.S. Court of Appeals for the Tenth Circuit. The U.S. Court of Appeals for the Tenth Circuit should be directed to deny the relief sought by defendants resolving the case as a matter of law. A different panel of the U.S. Court of Appeals for the Tenth Circuit should be directed to proceed to address the merits of the cross appeal filed by plaintiff.

Respectfully submitted,

STEVE R. FABERT, #10355
Counsel of Record
DAVID R. COOPER, #16690
Counsel for Petitioner
Fisher, Patterson, Sayler & Smith, L.L.P.
3550 S.W. 5TH Street, P.O. BOX 949
Topeka, Kansas 66601-0949
(785) 232-7761 (TELEPHONE)
(785) 232-6604 (FACSIMILE)
E-mail: sfabert@fisherpatterson.com
dcoooper@fisherpatterson.com

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APPENDIX A

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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ARTHUR C. WAGNER JR.
Individually and for the benefit of
Jean Marie Wagner,

Plaintiff-Appellee/
Cross-Appellant,

v.

LIVE NATION MOTOR
SPORTS, INC., formerly known as
SFX MOTOR SPORTS, INC., doing
business as Clear Channel
Entertainment-Motor Sports,

Defendant-Appellant/
Cross-Appellee,

No. 07-3365
& 07-3366

and

HEARTLAND PARK RACEWAY, LLC,

Defendant.

Appeal from the United States District Court for the District of Kansas (D.C. No. 2:05-CV-02336-JPO)

Paul M. Croker (Richard M. Enochs on the briefs), Overland Park, Kansas for Appellant/Cross-Appellee.

David R. Cooper (Larry G. Pepperdine and Steve R. Fabert with him on the briefs), Fisher, Patterson, Sayler & Smith, L.L.P., Topeka, Kansas for Appellee/Cross-Appellant.

Before **KELLY**, **EBEL**, and **MURPHY**, Circuit Judges

EBEL, Circuit Judge.

In this diversity case governed by Kansas tort law, SFX Motor Sports, Inc.[1] ("SFX"), appeals the district court's denial of its post-trial motion for judgment as a matter of law ("JMOL"). SFX argues that a reasonable jury could not have found SFX liable for wanton conduct based on its staging of an August 2003 motorcycle race in which Arthur Wagner, Jr. ("Wagner"), crashed and was seriously injured. Wagner cross-appeals, arguing that the district court erred in reducing his damages award pursuant to Kansas's statutory cap on noneconomic damages in personal injury actions. Exercising appellate jurisdiction under 28 U.S.C.§ 1291, we REVERSE the denial of SFX's motion for JMOL and DISMISS Wagner's cross-appeal as moot.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 8, 2003, Wagner competed in the Formula USA 250K Team Challenge Endurance Race at the Heartland Park racetrack in Topeka, Kansas. SFX staged the race pursuant to its Track Rental Agreement with Heartland Park Raceway, LLC to which Jayhawk Racing Properties, L.L.C. had assigned its rights to operate the track.[2] In order to participate in the August 8 race, Wagner had signed, the day

[1]Since the time of the events at issue in this appeal, SFX has changed its name to Live Nation Motor Sports, Inc. In keeping with the practice of the district court and the parties, we refer throughout to SFX rather than to Live Nation Motor Sports.

[2]Jayhawk Racing Properties, L.L.C. was, in turn, the assignee of the rights of the City of Topeka, the owner of the racetrack.

before, two documents entitled "Release and Waiver of Liability, Assumption of Risk, Indemnity and Rights Agreement." (R. vol. 1 at 142-44.) The first release and waiver, for which "HPT-Topeka, KS" served as the "[d]escription and location of scheduled events(s)," provided as follows:

> IN CONSIDERATION (a) of being permitted to compete . . .or (b) being permitted to enter, for any purpose, any Restricted Area . . ., including but not limited to the competition area . . ., EACH OF THE UNDERSIGNED, for himself/herself, his/her personal representatives, parent or legal guardian, heirs, and next of kin:
>
> 1. Acknowledges, agrees, and represents that he/she has or will immediately upon entering any such restricted areas, and will continuously thereafter, inspect the Restricted Areas which he/she enters[;] and he/she further agrees and warrants that, if at any time, he/she is in or about Restricted Areas and he/she feels anything to be unsafe, he/she will immediately advise the officials of such and will leave the Restricted Areas and or refuse to participate further in the Event(s).
>
> 2. HEREBY RELEASE[S], WAIVES, DISCHARGES AND COVENANTS NOT TO SUE SFX Motor Sports, Inc., d/b/a Clear Channel Entertainment-Motor

> Sports, and its affiliates and related companies . . . , track operators, . . . [and] owners and lessees of premises used to conduct the Event(s), . . . all for the purposes herein referred to as "Releasees", FROM ALL LIABILITY TO THE UNDERSIGNED, his personal representatives, parent or legal guardian, assigns, heirs, and next of kin FOR ANY AND ALL LOSS OR DAMAGE, AND ANY CLAIM OR DEMANDS THEREFORE ON ACCOUNT OF INJURY TO THE PERSON OR PROPERTY, OR RESULTING IN DEATH, OF THE UNDERSIGNED ARISING OUT OF OR RELATED TO THE EVENT(S), WHETHER CAUSED, IN WHOLE OR IN PART, BY THE SOLE OR CONCURRENT NEGLIGENCE OR WRONGDOING, STRICT LIABILITY OR FAULT OF THE RELEASEES OR OTHERWISE.

(R. vol. 1 at 142.) The second release waiver, indicating "Formula USA Testing" as the "Description and Location of Scheduled Events," included identical provisions. (Id. at 144.)

In addition to signing their releases and waivers on the day before the race, Wagner and other racers participated in practice sessions on the Heartland Park track. During those practice sessions, two riders had to leave the 2.5-mile track in the area of Corner 10; one rider had run out of fuel, and the other had a

mechanical problem with his motorcycle. Both motorcycles had to be pushed off the track.

During the race itself, on August 8, Wagner was entering Corner 10 and leaning into the left-hand curve when the wheels of his motorcycle hit a rumble strip, or berm, on the outside edge of the track. Wagner's motorcycle left the track, sliding– with Wagner still aboard– somewhere between 100 and 250 feet across the grass and dirt runoff area before colliding with an unpadded portion of a moveable concrete barrier. The motorcycle burst into flames that engulfed Wagner, who was thrown into the grass.

Throughout the race, including at the time of Wagner's crash, the track's turns were staffed by "corner workers," who were to act as flaggers to inform racers to proceed with caution or to stop altogether in the event of an accident, and who also were to serve as emergency responders to aid downed racers. Corner workers were provided colored flags, radios with which they were to communicate with the control tower and with other corner workers, and a fire extinguisher. In roughly hour-long meetings on the mornings of August 7 and August 8, the corner workers had been instructed, at a minimum, when to use the radio system and what color flags they should wave in the event of an accident.

Corner 10 was staffed by a married couple, Randy and Linda Bodtke, whom SFX had hired through a temporary employment services agency. Like other corner workers at the race, the Bodtkes were positioned on the inside of their corner, behind a barrier that separated and protected them from the

riders on the track. When Wagner crashed on the outside of the track, therefore, the Bodtkes and other corner workers had to wait for race traffic to clear, climb over the short wall separating them from the track, and cross the track in order to reach him.

Although Linda Bodtke radioed the control tower and began waving her red and yellow flags when she saw the accident, the racers temporarily continued circling the track at race speed. After the last motorcycle cleared their area, Randy Bodtke and the worker at Corner 11 climbed over the barrier, crossed the track, and reached Wagner. Both carried their fire extinguishers to the crash scene. The worker from Corner 11 arrived first; Randy Bodtke believed he arrived within a minute of the crash. Both Randy Bodtke and the worker from Corner 11 sprayed their fire extinguishers on the grass around Wagner, and one or the other may also have sprayed his fire extinguisher on Wagner's back. The corner workers had been instructed not to spray fire extinguishers in a crash victim's face; they had also been instructed not to touch or move a crash victim until emergency personnel arrived.

An ambulance and fire suspension truck responded to the crash scene. However, both vehicles had to wait for a gate to be opened before they could drive onto the infield of the track. Emergency personnel attended to Wagner and placed him on a backboard, and at some point during this process, an unidentified individual called for the life-flight helicopter. Roughly forty-five minutes after the crash, Wagner arrived, by that helicopter, at the KU Medical Center. He was treated for multiple fractures and for

serious burns over most of his lower extremities and one hand, and he was hospitalized for several weeks after the accident.

On August 2, 2005, Wagner, who at the time resided in Florida, filed a diversity lawsuit in federal district court for the District of Kansas, pleading negligence and wanton conduct of alternative theories of recovery under Kansas law. Wagner named as defendants, SFX; Heartland Park Raceway, L.L.C.; SFX Entertainment, Inc.; Clear Channel Communications, Inc.; and Jayhawk Racing Properties, L.L.C. Following discovery, and based on the release and waiver forms that Wagner had signed before the race, the district court granted SFX and Heartland Park partial summary judgment on Wagner's negligence claims. The court granted full summary judgment to the remaining defendants, because the record contained no evidence from which a jury might conclude that they owed any duty to Wagner. The case thus went to trial solely against SFX and Heartland Park, and solely on a theory of wanton conduct under Kansas law.[3]

The parties consented to disposition of the case by the magistrate judge, and after a five-day trial over which he presided, the jury returned a verdict in favor

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[3]In ruling on the defendants' motion for summary judgment, the district court explained that unlike negligence, "[w]anton conduct would be actionable because it falls outside the scope of plaintiff's waiver." Wagner v. SFX Motor Sports, Inc., 460 F.Supp. 2d 1263, 1271 (D.Kan. 2006) (citing Wolfgang v. Mid-Am. Motorsports, Inc., 898 F.Supp. 783, 788 (D.Kan. 1995), aff'd. 111 F.3d 1515 (10th Cir. 1997), to the effect that "under Kansas common law, [an] attempt to waive liability for wanton conduct [is] unenforceable").

of Heartland Park and against SFX. The jury awarded Wagner roughly $2.6 million in compensatory damages. Following entry of judgment in accordance with the jury's verdict, SFX moved under Fed. R. Civ. P. 50(b) for JMOL,[4] based on a claim of insufficient evidence to support a jury finding of wanton conduct; under Rule 59(a) for a new trial, based on a claim of the court's error in not instructing the jury on comparative fault principles or on the distinction between negligence and wanton conduct; and under Rule 59(e) for alteration or amendment of the judgment, based on Kansas's statutory cap of $250,000 on noneconomic damages in a personal injury action.

The district court denied the motion for JMOL and the motion for new trial, but granted in part the motion to alter or amend the judgment. The court held that because the parties had agreed that substantive issues in the case were to be governed by Kansas law, the state's mandatory cap of noneconomic damages in personal injury cases applied to the judgment against SFX. The court then ordered entry of an amended

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[4]In its briefs, SFX refers to its Rule 50(b) motion by its pre-1991 name, as a motion for judgment notwithstanding the verdict. As did the district court, we refer to the motion as one for judgment as a matter of law, or JMOL. See Magnum Foods, Inc. v. Continental Cas. Co., 36 F.3d 1491, 1497 n.1 (10th Cir. 1994).

Pursuant to Rule 50(a), SFX had moved for JMOL at the close of both Plaintiff's evidence and its own evidence; the district court denied both motions.

judgment that reduced Wagner's damages by just over a million dollars.[5]

SFX timely appealed, arguing that the district court erred in (1) not granting its post-trial motion for judgment as a matter of law; (2) not instructing the jury on comparative fault, and restricting SFX's introduction of evidence on that subject; (3) not instructing the jury on the definition of simple negligence, and the distinction between simple negligence and wanton conduct; and (4) not granting a new trial. SFX also filed a motion asking that we certify to the Kansas Supreme Court the question of whether, under Kansas law, comparative fault principles apply within an action based solely on a claim of wanton conduct.

On cross-appeal, Wagner argues that the district court erred in reducing his damages award based on Kansas's statutory cap on noneconomic damages in personal injury actions. He further argues that even if the cap does apply in this case, the district court erred in applying it to the portion of the award for loss of spousal support.

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[5]The district court explained that the jury award included "$264,625 for noneconomic loss to date, $758,150.62 for future noneconomic loss, and $263,380.91 for loss or impairment of services as spouse, for a combined total of $1,286,156.53 in noneconomic loss." Wagner v. SFX Motor Sports, Inc., 522 F. Supp. 2d 1330, 1345 (D.Kan. 2007). Applying the statutory damage cap, the court reduced this to $250,000. Id.

II. DISCUSSION

A. *Motion for Judgment as a Matter of Law*

1. Standard of review

We review de novo the district court's denial of a Rule 50(b) motion for JMOL, and we apply the same legal standard as did the district court. United Mine Workers of Am. v. Rag Am. Coal Co., 392 F.3d 1233, 1237 (10th Cir. 2004). In a diversity case such as this one, "the substantive law of the forum state governs the analysis of the underlying claims, including specification of the applicable standards of proof, but federal law controls the ultimate, procedural question whether [JMOL] is appropriate." Specialty Beverages, L.L.C. v. Pabst Brewing Co., 537 F.3d 1165, 1175 (10th Cir. 2008).

A party is entitled to JMOL only if the court concludes that "all of the evidence in the record . . . [reveals] no legally sufficient evidentiary basis for a claim under the controlling law." Hysten v. Burlington N. Santa Fe Ry. Co., 530 F.3d 1260, 1269 (10th Cir. 2008) (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000)). Drawing all reasonable inferences in favor of the nonmoving party, which in this case is Wagner, we thus will reverse the district court's denial of the motion for JMOL "if evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." Hardeman v. City of Albuquerque, 377 F.3d 1106, 1112 (10th Cir. 2004) (quotation omitted). It is not our province to "weigh evidence, judge witness credibility,

or challenge the factual conclusions of the jury." Hysten, 530 F.3d at 1269 (quotation omitted).

2. Wanton conduct under Kansas law

In Kansas, wanton conduct "is distinct from negligence and differs in kind." Bowman v. Doherty, 686 P.2d 112, 118 (Kan. 1984) (citing Kniffen v. Hercules Powder Co., 188 P.2d 980 (Kan. 1948)). Unlike negligence, "[w]anton conduct is established by the mental attitude of the wrongdoer rather than by . . . particular negligent acts." Robison v. State, 43 P.3d 821, 824 (Kan. Ct. App. 2002) (citing Friesen v. Chicago, Rock Island & Pacific R.R., 524 P.2d 1141 (Kan. 1974)). That is "[w]anton conduct is distinguished from a mere lack of due care by the fact that the actor realized the imminence of injury to others from his acts and refrained from taking steps to prevent the injury." Bowman, 686 P.2d at 118. "This reckless disregard or complete indifference rises substantially beyond mere negligence." Id. Because "wantonness" derives from "the mental attitude of the wrongdoer[,]. . . acts of omission as well as acts of commission can be wanton." Gould v. Taco Bell, 722 P.2d 511, 518 (Kan. 1986).

To establish wanton conduct, a plaintiff must make a two-pronged showing: (1) that the act was "performed with a realization of the imminence of danger"; and (2) that the act was performed with "a reckless disregard [of] or complete indifference to the probable consequences of the act." Reeves v. Carlson, 969 P.2d 252, 256 (Kan. 1998); see also Gould, 722 P.2d at 518. Thus, "[t]he keys to a finding of wantonness are the knowledge of a dangerous

condition and indifference to the consequences." Reeves, 969 P.2d at 256. The plaintiff need not prove any intent or willingness to injure. Lanning ex rel Lanning v. Anderson, 921 P.2d 813, 818 (Kan.Ct. App. 1996) (citing Boaldin v. Univ.of Kan., 747 P.2d 811, 814 (Kan. 1987)); see also Reeves, 969 P.2d at 256.

The first prong of the tort– that the act was performed with a realization of the imminence of danger–may be established in two ways. First, the plaintiff may put on direct evidence of the defendant's actual "knowledge of a dangerous condition." Lanning, 921 P.2d at 819. Second, the plaintiff may establish, through circumstantial evidence, the defendant's "reason to believe that his act [might] injure another," because that act was taken "in disregard of a high and excessive degree of danger, either known to [the defendant] or apparent to a reasonable person" in the defendant's position. Id. (quotations and emphasis omitted).

As to the tort's second prong, reckless disregard of or indifference to probable consequences, the Kansas Supreme Court has explained that "a token effort to prevent [harmful consequences] would not avoid liability under this [prong], while definite acts which materially lessen the chances of [those consequences] would avoid liability." Friesen, 524 P.2d at 1148. Critical to our analysis of such precautions is whether they materially lessen the chances of the consequences of the particular "dangerous condition" that we analyze under the tort's first prong.

In Reeves v. Carlson, for instance, the defendant injured the plaintiff when, while driving intoxicated,

he ran a stop sign at an intersection and crashed through a wall of her house. 969 P.2d at 256. The defendant argued that the plaintiff had not established that "he was fully aware of and clearly understood that he was about to collide with [the plaintiff's] home and that he was indifferent to the impending collision." Id. (emphasis in original). The court explained that the defendant "fail[ed] to recognize that the wanton conduct" at issue "was not the collision, but his choice to drive under circumstances that would likely or probably result in a collision." Id. In that case, "[t]he precautions and care" that the defendant claimed to have taken "did little, if anything, to reduce that risk. Id. (emphasis added).

In assessing whether a plaintiff has established wanton conduct, then, we must take care to apply both prongs of the tort to the same alleged risk, whether that risk be described narrowly (e.g., the risk of the specific accident that occurred) or broadly (e.g., the risk of any serious accident occurring because of the conduct at issue – e.g., the risk of any accident when the driver is intoxicated. See Reeves, supra.) In other words, if the first part of Kansas' two-part inquiry asks whether the defendant had knowledge of a broadly described dangerous condition, the second part of that inquiry must ask whether the defendant recklessly disregarded or was indifferent to the same broadly described risk; conversely, if the first part of the test targets the narrow, specific risk that caused the particular accident at issue and aks if the defendant was aware or should have been aware of that particular specific risk, then the second part of the analysis to be consistent must ask if the defendant was indifferent to that specific risk. In short, a plaintiff

may not establish wanton conduct by satisfying the notice or knowledge element of the tort as to one risk–e.g., a broad generalized risk–and the second element of indifference of that risk to a differently defined risk– e.g., the specific risk that caused the accident at issue.

We need not decide in this case whether both the knowledge of the risk and the indifference to that risk should define risk in a generalized and broad manner or in a narrow, specific manner, and indeed courts seem to have used both approaches. Compare Robison v. State, 43 P.3d 821 (Kan. App. 2002), and Friesen v. Chicago, Rock Island & Pacific R.R., 524 P.2d 1141 (Kan. 1974), with Reeves v. Carlson, 969 P.2d 252 (Kan. 1998).

But what we can and do conclude from our review of Kansas law is that risk must be defined consistently for both elements of the tort of wantonness. As will be seen here, whether the risk is to be defined broadly (e.g., the risk of any accident in motorcycle races generally) or narrowly (e.g., the specific risk that a motorcycle might leave the track at corner #10 in this race) a JMOL should have been granted to SFX in this case so long as the risk is defined as consistently for both elements of this test.

Finally, "[w]hether a defendant's conduct constitutes wantonness necessarily depends on the facts and circumstances of each case." Wolfgang, 111 F.3d at 1522 (applying Kansas law and citing Friesen, 524 P.2d at 1147).

3. Analysis

Wagner alleged seven grounds for wanton conduct on the part of SFX:

a. Defendants failed to provide a safe run-off area for foreseeable crashes.

b. Defendants left unnecessary moveable concrete walls in the foreseeable run-off area.

c. The concrete walls that were in the foreseeable run-off area, where plaintiff hit the wall, were not padded or protected with tires, hay bales, air fences, or other safety devices.

d. Defendants failed to properly train and equip corner workers or fire fighting personnel so that they could quickly and effectively put out the fire that resulted from plaintiff's crash.

e. Defendants failed to staff Corners 10 and 11 with adequate numbers of corner workers, and failed to have any corner workers on the outside of Corners 10 and 11 so that they could quickly respond to an injured racer.

f. Defendants' corner workers, fire fighting personnel, and medical personnel failed to put out the fire that engulfed plaintiff,

such that the fire ceased burning on its own after running out of fuel.

g. The communications system between corner workers and the tower was inadequate, such that the race could be timely stopped as soon as the accident occurred.

(R. vol. 4 at 1091-92 (Jury Instruction No. 14).) We think these allegations may be construed as positing two different levels of risk, or two different "dangerous condition[s]," Reeves, 969 P.2d at 256: the broad risk associated with staging a motorcycle race writ large; and the much narrower risk associated with the conditions on Corner 10 at Heartland Park racetrack. We address each in turn, applying Kansas's two-pronged test for wanton conduct and recognizing, as did the district court, that the jury was "within its rights to believe little, or indeed, none of the sworn testimony" favorable to SFX. Wagner, 522 F. Supp.2d at 1339; see Sanderson Plumbing Prods., 530 U.S. at 151 ("[A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.").

a. Risk of staging a motorcycle race

To satisfy the first part of the two-part test for wanton conduct, Wagner had to demonstrate that in staging the race in which he was injured, SFX acted, or failed to act, "with a realization of the imminence of danger." Reeves, 969 P.2d at 256. This prong of the test is easily satisfied if the risk is broadly defined as

the risk of operating a motorcycle race. The jury heard testimony from Wagner's expert, Russell Darnell, that the "starting point" for all motorcycle race planning is that "crashes will happen." (R. vol. 6 at 1591-92.) Indeed, SFX could not rationally dispute this point, given that it required the racers to sign a waiver form acknowledging that "THE ACTIVITIES OF THE EVENT(S) ARE VERY DANGEROUS and involve the risk of serious injury and/or death and/or property damage." (R. vol. 1 at 142.) Wagner put on evidence sufficient to establish that SFX realized the imminence of danger in its overall staging of a motorcycle race.

To satisfy the second part of the two-part test for wanton conduct at this level of risk, Wagner was required to demonstrate that in its overall staging of the race, SFX acted with "reckless disregard [of] or complete indifference to the probable consequences of" its conduct. Reeves, 969 P.2d at 256. Here, applying the Friesen rule regarding preventative measures, we easily conclude that Wagner failed to put on evidence based upon which a reasonable jury could have found that SFX acted wantonly rather than merely negligently. Under Friesen, "a token effort" to prevent the harmful consequences of staging a motorcycle race "would not avoid liability" for wanton conduct, but "definite acts which materially lessen the chances of" such consequences would avoid liability. Friesen, 524 P.2d at 1148.

It is undisputed that SFX engaged in a number of such definite acts to make the overall motorcycle race safer, including opening the track for practice runs on both the day before and the morning of the race to permit racers to learn the track; stationing at

least one corner worker at each corner, providing those workers with a radio communication system, a fire extinguisher, and colored flags for slowing or stopping the race in case of an accident, and training the workers for roughly an hour on each of the mornings of August 7 and August 8; having two ambulances and a fire-suppression vehicle onsite during the race; placing protective air fencing in certain areas and tires along certain portions of concrete barriers outside the track; and being prepared to call for a life-flight helicopter if the need arose. We think it clear that while these preventative measures may not have been perfect, they unquestionably "materially lessen[ed] the chances," Friesen, 524 P.2d at 1148, of harmful consequences arising from SFX's staging of the race. In short, SFX took many significant steps to ensure that the race as a whole was safe.

Therefore, even if SFX acted negligently in staging the race–a claim Wagner waived when he signed the pre-race release form–it did not act with "reckless disregard [of] or complete indifference to the probable consequences of" its conduct, Reeves, 969 P.2d at 256. We thus conclude that in construing the alleged risk and dangerous condition of conducting a motorcycle race broadly, a reasonable jury could not have found SFX liable for wanton conduct. See Fed. R. Civ.P.50(a).

b. Specific risk associated with the conditions on Corner 10

Wagner's case at trial, and his argument on appeal, focused most intensely on the claim that SFX behaved wantonly when it did not eliminate or protect

with padding the concrete wall into which Wagner crashed, or enlarge the run-off area, outside Corner 10. To succeed on this claim based on a very specific risk that arguably contributed to Wagner's injuries, Wagner was required to show, first, that SFX acted, or failed to act, with a realization of the imminence of danger at Corner 10. Wagner could have made this showing either through direct evidence of SFX's actual "knowledge of a dangerous condition" at Corner 10, or through circumstantial evidence that SFX acted in "disregard of a high and excessive degree of danger" at Corner 10, where that danger was "known [by SFX] or apparent to reasonable person" in SFX's position. Lanning, 921 P.2d at 819.

While the jury was free to disregard or doubt the credibility of SFX's employees and former employees who testified that they were aware of no previous crashes at Corner 10 and that they had no reason to believe that the concrete wall in question would be an impact area, the jury was not free to infer SFX's knowledge of danger from an absence of evidence on the issue. Wagner offered no testimony to the effect that there had ever been a crash in the area of Corner 10, much less that the danger of such a crash was "known [by SFX] or apparent to a reasonable person" in SFX's position. Lanning, 921 P.2d a 819. While Randy Bodtke testified that he saw two racers go off the track at Corner 10 during the practice sessions on August 7, he clarified on the cross-examination that one of the motorcycles at issue simply ran out of gas at that location and the other had a mechanical problem, so that both had to be pushed off the track. Bodtke then confirmed that he "saw no riders that had traveled all of this distance

across this grassy area and got down to where there was an impact with the wall." (R. vol. 6 at 1526.) Wagner offered no evidence that SFX knew or should have known of the danger posed by the configuration of Corner 10.

Because there is no record evidence showing that SFX acted with "a realization of the imminence danger" when it did not take additional precautions at Corner 10, we need not and do not reach the question of whether SFX acted with "a reckless disregard [of] or complete indifference to the probable consequences of" its conduct at Corner 10. Reeves, 969 P.2d at 256; see Lanning, 921 P.2d at 819 ("Without knowledge of a dangerous condition, indifference to the consequences does not become a consideration."). We conclude that in construing the alleged risk and dangerous condition narrowly, a reasonable jury could not have found SFX liable for wanton conduct. See Fed. R. Civ. P. 50(a). However, we do observe that the general safety precaution that SFX took in conjunction with staging this race and which we detailed earlier would generally apply to Corner 10 as much to other portions of the race track. Thus, even if Wagner had put on evidence that SFX knew Corner 10 was dangerous, Wagner did not show that SFX was "completely indifferent" to that danger.

c. Conclusions as to this issue

In this case, "all of the evidence in the record . . . [reveals] no legally sufficient evidentiary basis, Hysten, 530 F.3d at 1269, for a wanton claim under Kansas law. Under one theory of the case there was evidence that SFX knew of the danger but it

unquestionably took many steps to mitigate or prevent injury, thereby precluding a jury conclusion that SFX cited "incomplete indifference" to the danger. Under the theory of the case, there was no evidence that SFX knew or should have known if a specific risk presented because of the configuration or operations at Corner 10, so once again, the jury could not find wanton conduct. Consequently, SFX was entitled to JMOL, and the district court erred in denying SFX's Rule 50(b) motion.

B. *Remaining issues on appeal*

Having held that SFX is entitled to JMOl, we need not and do not reach SFX's challenge to jury instructions and to the district court's denial of its motion for new trial.

III. CONCLUSION

For the foregoing reasons, we REVERSE the district court's denial of SFX's Rule 50(b) motion, VACATE the jury's verdict on Wagner's wanton conduct claim, and REMAND to the district court with instructions to enter judgment as a matter of law in favor of SFX. Wagner's cross-appeal is dismissed as moot, and the pending motion for certification to the Kansas Supreme Court is denied as moot.

APPENDIX B

Case: 2:05-cv-02336-JPO Document 168
Filed 11/27/2007

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ARTHUR C. WAGNER, JR., individually and for the benefit of his wife, Jean Marie Wagner,	)	
Plaintiff,	)	
v.	)	Case No. 05-2336-JPO
SFX MOTOR SPORTS, INC., et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

I. Introduction

This is a personal injury case which arises out of a crash during a commercially sponsored motorcycle road race. Following five days of trial, the jury returned a verdict in favor of the plaintiff, Arthur C. Wagner, Jr., finding wanton conduct by the race sponsor-promoter, defendant SFX Motor Sports, Inc. ("SFX"), and awarding nearly $2.6 million in

compensatory damages (doc. 150). The jury rejected plaintiff's wanton conduct claims against the track's owner-operator, defendant Heartland Park Raceway, L.L.C. ("Heartland Park").

With judgment having been entered based on the jury's verdict (*see* doc. 154), the case now comes before the court on SFX's post-trial motion for judgment as a matter of law or, in the alternative, for a new trial (doc. 157). Also before the court is SFX's separate motion to alter or amend judgment (doc. 159). These motions have been extensively briefed (*see* docs. 158, 160-65, & 169).

For the reasons explained below, the court denies SFX's motion for judgment as a matter of law or, in the alternative, for a new trial. SFX's motion to alter or amend the judgment is granted in part and denied in part, i.e., the judgment must be reduced by approximately $1 million in accordance with K.S.A. § 60-19a02, the Kansas statute that imposes a $250,000 "cap" on jury awards of noneconomic damages.

II. Background and Uncontroverted Facts

On August 8, 2003, plaintiff was injured as a result of a motorcycle crash while competing in the "Formula USA 250K Team Challenge Endurance Race" at the Heartland Park racetrack in Topeka, Kansas. The track is owned by the City of Topeka, but the City assigned its rights to operate the track to Jayhawk Racing Properties, L.L.C. ("Jayhawk"), which in turn assigned its rights to Heartland Park.

On March 1, 2003, Heartland Park and SFX entered into a track rental agreement. This agreement authorized SFX to stage Formula USA Series and Championship Cup Series motorcycle races at the track from August 8 through 10, 2003.

During a race competition on August 8, 2003, plaintiff's motorcycle slid off the 2.5 mile track at what is known as Corner 10. Plaintiff crossed the grass and dirt "run-off" area outside Corner 10 and collided with an unprotected portion of a concrete barrier. The collision ignited a fire which engulfed both plaintiff and the motorcycle. Plaintiff suffered severe injuries.

During this particular race, SFX placed corner workers in various stations along the track. They acted as flaggers to inform racers to proceed with caution or stop altogether in the event of an accident. They also served as emergency responders by helping downed racers if necessary. At the time of plaintiff's accident, the two corner workers assigned to Corner 10 were Randy Bodtke and his wife, Linda Bodtke, both of whom had been hired by SFX through a temporary employment services agency.

On August 2, 2005, plaintiff filed suit in this federal court against SFX, Heartland Park, and Jayhawk, as well as SFX Entertainment, Inc. d/b/a Clear Channel Entertainment ("SFX Entertainment") and Clear Channel Communications, Inc. ("Clear Channel").[1] Plaintiff's complaint pleaded negligence

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[1]Plaintiff resides in New York. The court has diversity subject matter jurisdiction pursuant to 28 U.S.C § 1332(a)(1). Pretrial

(continued .)

and wanton conduct as his alternative theories of recovery. On October 27, 2006, after discovery had been completed, the presiding U.S. District Judge, Hon. Kathryn H. Vratil, granted partial summary judgment in favor of SFX and Heartland Park on plaintiff's ordinary negligence claims, based on pre-race release executed by plaintiff and each of his fellow competitors (doc. 66). Judge Vratil also granted summary judgment as to *all* of plaintiff's claims against Jayhawk, SFX Entertainment, and Clear Channel, finding there was no basis for liability of any of these defendants. As a result, SFX and Heartland Park were the only two defendants at trial, with wanton conduct being the sole theory of recovery.

On January 5, 2007, pursuant to 28 U.S.C.§ 636(c) and Fed. R. Civ. P. 73, the parties consented to the disposition of this case by the undersigned U.S. Magistrate Judge, James P. O'Hara (*see* doc. 73). At trial, which began on July 30, 2007, plaintiff claimed his injuries resulted in SFX's and Heartland Park's wanton failure to provide proper protection to race participants. As earlier indicated, the jury returned a defense verdict for Heartland Park (the track's owner-operator) and a verdict for plaintiff against SFX (the race sponsor-promoter).

III. SFX'S Renewed Motion for Judgment as a Matter of Law

A. Procedural Standards

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[1](..continued)
order (doc. 62 ¶ 3(a)).

A post-trial motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) is appropriate only if the evidence, viewed in a light most favorable to the nonmoving party, "points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion."[2] Such motions should be "cautiously and sparingly granted."[3] In determining whether judgment as a matter of law is proper, the court may not weigh the evidence, consider the credibility of witnesses, or substitute its judgment for that of the jury.[4] Rather, the court must affirm the jury verdict if, viewing the record in a light most favorable to the nonmoving party, it contains evidence upon which the jury could have properly returned a verdict for the nonmoving party.[5] Conversely, though, the court must enter judgment as a matter of law for the movant if "'there is no legally sufficient evidentiary

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[2] *Sanjuan v. IBP, Inc.*, 275 F.3d 1290, 1293 (10th Cir. 2002) (quoting *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1241 (10th Cir. 1991)).

[3] *Black v. M & W Gear Co.*, 269 F.3d 1220, 1238, (10th Cir. 2007) (quoting *Neese v. Schuckman*, 98 F.3d 542, 548 (10th Cir. 1996)).

[4] *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1241 (10th Cir. 2001) (citing *Lockard v. Pizza Hut*, 162 F.3d 1062, 1068 (10th Cir. 1998)).

[5] *Roberts v. Progressive Independence, Inc.*, 183 F.3d 1215, 1219-20 (10th Cir. 1999) (citing *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1546 (10th Cir. 1996)).

basis . . . with respect to a claim or defense . . . under the controlling law.'"[6]

B. Sufficiency of the Evidence

SFX argues plaintiff's claim that SFX acted with wanton disregard of a known or obvious risk of harm at Corner 10 is simply not supported by the evidence in this case. In reviewing and discussing the evidence, SFX consistently construes the record in favor of SFX instead of plaintiff. Although perhaps understandable, this ultimately is fatal to SFX's motion.

As set forth in Jury Instruction No. 15 (doc. 135 at 18-19), which was patterned after Judge Vratil's very detailed and well-reasoned memorandum and order ruling on the defendants' motion for summary judgment (doc. 66), under Kansas law wanton conduct is a product of a defendant's mental attitude.[7] To establish wanton conduct, a plaintiff must show the defendant's realization of the imminence of danger and a reckless disregard, complete indifference, or lack of concern for the probable consequences of the wrongful act.[8]

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[6] *Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1268 (10th Cir. 2000) (quoting *Harolds*, 82 F.3d at 1546-47).

[7] *Robison v. State*, 30 Kan. App. 2d 476, 479, 43 P.3d 821, 824 (2002).

[8] *Lanning v. Anderson*, 22 Kan. App. 2d 474, 479, 921 P.2d 813, 818 (1996) (quoting *Boaldin v. Univ. of Kan.*, 242 Kan. 288, 293, 747 P.2d 811, 814 (1987)).

The defendant's realization of an imminent danger may be established with circumstantial evidence that (1) the defendant had reason to believe such a danger existed, or (2) the defendant disregarded a known or obvious risk from which harm was likely to occur.[9] Such evidence may be used to form a legitimate inference as to the requisite knowledge of the defendant.[10]

SFX's papers implicitly ignore that a defendant's reckless disregard or complete indifference need not include an intent to injure.[11] That is, since reckless disregard and indifference are characterized by failure to act when action is called for to prevent injury, wanton conduct includes acts of omission as well as acts of commission.[12] Preventative measures will preclude a finding of wantonness only where those measures will preclude a finding of wantonness only where those measures "materially lessen the chances of the injury suffered by the plaintiff."[13] The ultimate determination of whether conduct is wanton is generally a question of fact for the jury.[14]

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[9] *Id.* at 482, 921 P.2d at 819-20.

[10] *Id.*

[11] *Reeves v. Carlson*, 266 Kan. 310, 314, 969 P.2d 252, 256 (1998).

[12] *Gould v. Taco Bell*, 239 Kan. 564, 572, 722 P 2d 511, 518 (1986).

[13] *Wolfgang v. Mid-Am. Motorsports, Inc.*, 111 F.3d 1515, 1523 (10th Cir. 1997).

[14] *Gruhin v. City of Overland Park*, 17 Kan. App 2d 388, 392, 836 P.2d 1222, 1225 (1992).

As set forth in Jury Instruction No. 14 (doc. 135 at 15-17), and consistent with the material factual issues of the case as preserved in the final pretrial order (doc. 62 at ¶ 6(a)), plaintiff alleged the following specific grounds for wanton conduct by SFX and Heartland Park:

a. Defendants failed to provide a safe run-off area for foreseeable crashes.

b. Defendants left unnecessary moveable concrete walls in the foreseeable run-off area.

c. The concrete walls were in the foreseeable run-off area, where plaintiff hit the wall, were not padded or protected with tires, hay bales, air fences,[15] or other safety devices.

d. Defendants failed to properly train and equip corner workers or fire fighting personnel so they could quickly and effectively put out the fire that resulted from plaintiff's crash.

e. Defendants failed to staff Corner 10 and 11 with adequate numbers of corner workers, and failed to have any corner workers on the outside of Corner 10 and

[15] In the racing industry, an air fence is a protective device placed against a hardened barrier. It operates much like an air bag in an automobile

11 so they could quickly respond to an injured racer.

f. Defendants' corner workers, fire fighting personnel, and medical personnel failed to put out the fire that engulfed plaintiff, such that the fire ceased burning on its own after running out of fuel.

g. The communications system between corner workers and the tower was inadequate, such that the race could be timely stopped as soon as the accident occurred.

SFX argues that none of these grounds are supported by the evidence in this case.

SFX initially asserts that the run-off area and barrier outside Corner 10 were not dangerous and that, in any event, Heartland Park, not SFX, had control over the placement of the barrier. Further, SFX argues it did not subjectively consider the run-off area to be dangerous. In this regard, SFX points to the testimony of former SFX manager Kenneth Abbott, and SFX's director of operations, Kevin Elliott. Both Abbott and Elliott, and most of the competitive racers (including plaintiff), conducted pre-race test runs of the track and none of them reported the run-off area at Corner 10 as being unsafe. Gordon Spieckerman, a safety officer for the Midwest Racing Association hired by SFX to monitor the corner workers and the track on the day of the race, as well as Bill Ritger, a race control supervisor for SFX, also conducted a pre-race

inspection of the track, and neither identified Corner 10's run-off area as unsafe.

Abbott and Elliott testified they implemented safety barriers in all locations they felt were the primary target zones for impact, including a portion of the wall at Corner 10. This testimony was confirmed by Spieckerman and Ritger.

SFX also heavily relies on the testimony of William Fehrman, a law enforcement officer who served as SFX's race director on August 8, 2008. Fehrman testified that he had a great deal of racing experience, including intimate familiarity with Heartland Park, having worked races there since the track opened in the late 1980s, and including several stints as race director since the early 1990s. According to Fehrman, he never perceived the run-off area and barrier outside Corner 10 to present a significant safety hazzard, and had never received any complaints from racers or anyone else about that corner.

Plaintiff counters by arguing evidence was presented during trial showing that Corner 10 and its run-off area were dangerous, that SFX had reason to believe so, and that SFX disregarded the known or obvious risk from which harm was likely to occur. Specifically, plaintiff points out that Randy Bodtke, a corner worker at Corner 10, testified that *several* motorcycles had run off the track at Corner 10 during practice runs on the day of the accident. Further, plaintiff notes it is uncontroverted that the portion of the wall near Corner 10 where plaintiff impacted was unprotected, i.e., it was not lined with tires, hay bales, air fence, or other safety devices. Plaintiff also notes

that Raymond Irwin, the principal owner of Heartland Park, testified SFX could have instructed Heartland Park to remove the concrete barrier outside of Corner 10, or at least could have placed safety devices along the barriers there. Irwin testified that, if SFX had required this action and stipulated it was a safety issue, Heartland Park would have done so. Heartland Park had the equipment available to move the barriers. Additional tires were also available that could have been used to protect against impact with the barrier at Corner 10 where plaintiff's accident occurred. Plaintiff's retained expert witness on liability, Russell Darnell, also testified the concrete barrier outside of Corner 10 could have been removed and SFX could have padded the barriers with air fence or other devices.

As to the corner workers and other emergency personnel, SFX asserts that two corner workers were stationed at Corner 10 on the day of the accident and one of those corner workers, Randy Bodtke, was equipped with a fire extinguisher. Mr. Bodtke testified and used the fire extinguisher to spray plaintiff's motorcycle and the corner worker from Corner 11 used his fire extinguisher to put out the fire on the ground around plaintiff after the accident. Spieckerman testified that he felt the corner workers were adequately trained and understood their responsibilities after their meeting on the day of the accident. Spieckerman, Ritger, Elliott, and Fehrman testified they believed there were a sufficient number of corner workers at Heartland Park on the day of the accident. Linda Bodtke, the other corner worker at Corner 10, testified she was equipped with a radio to communicate with the control tower and she did not

have any communication problems on the day of the accident.

Plaintiff, however, counters by pointing out that Randy Bodtke was delayed in reaching plaintiff immediately after the accident. Although the court believed a strong preponderance of the evidence showed SFX timely and appropriately responded to plaintiff's crash, there was some testimony by Mr. Bodtke that motorcycles continued racing after the accident and he had to wait for the last motorcycle to pass before he could safely cross the track to attend to plaintiff. In this regard, it is important to note that even Abbott and Ritger conceded that the preferred arrangement is to have three workers at each corner - with two on the inside track, and one on the outside; this arrangement obviously would have allowed for a quicker response to plaintiff's plight. On the day of plaintiff's accident, there were only two corner workers stationed at Corner 10 and only one at Corner 11, and *none* of these individuals were positioned on the outside of the track where plaintiff crashed.

Laura Lee Jones, another racer, testified she was the first person to attend to plaintiff after the accident. According to Jones, SFX's emergency personnel, at least initially, did not attend to plaintiff. Jones and Billy Keener, a friend of the plaintiff and member of his pit crew, testified they did not see anyone using fire extinguishers at the scene of the accident. Keener stated that, although the corner workers were present at the scene, they did not attend to plaintiff.

Prior to the day of the accident, Randy Bodtke had no experience as a race corner worker. His wife, Linda Bodtke, had very limited experience as a corner worker and even that was twenty years prior on a much smaller track. As earlier indicated, both Mr. and Mrs. Bodtke were hired by SFX for the race from a temporary employment agency. Ritger and Spieckerman conceded that inexperienced corner workers should not be put together, but should be paired with an experienced corner worker.

Several witnesses testified corner workers are not to wave a red flag to stop the race without approval from the control tower. Linda Bodtke testified that enough time had passed between her initial radio notification to the control tower of the accident to her receiving authorization from the control tower to wave the red flag that the racers had gone all the way around the 2.5 mile track again. Keener testified he was timing plaintiff during the race and it took plaintiff approximately one minute and forty seconds to complete a lap.

During trial, the court denied the defendants' motion for judgment as a matter of law, but expressed reservations about the strength of plaintiff's wanton conduct claims. It should come as no surprise that, had this case been tried to the court sitting without a jury, there would not have been any finding of wanton conduct on the part of SFX. That is, the trial judge found the testimony of Abbott, Spieckerman, Ritger and Fehrman to be *exceptionally* credible and almost entirely favorable to SFX, in that all these gentlemen are very experienced in motorcycle race operations and safety, and all seemed quite sincere in their efforts to

stage the race as safely as possible, mindful that racing presents many inherent dangers. The court perceived the testimony of plaintiff's retained expert witness (Russell Darnell) to be pretty much of the "hired gun" variety, in that he claimed to be an expert not only on motorcycle racing but on a nearly endless number of topics. But of course this was not a bench trial. As earlier indicated, a trial judge does no have veto power over a jury which draws its own reasonable inferences from the trial record as a whole. Although SFX implicitly ignores this major point, the jury in this case was within its rights to believe little, or indeed, none of the sworn testimony of SFX's employees. The jury was within its prerogative to deem Darnell credible, even if the trial judge perceived him be to quite the opposite.

In reviewing the evidence as a whole as presented to the jury during trial in a light most favorable to plaintiff, and indulging plaintiff all of reasonable inferences that can be drawn from the trial record, the court finds plaintiff has met his evidentiary burden, although just barely so, to prove it is more probably true than not true that plaintiff sustained injuries caused by SFX's wanton conduct. Specifically, the court finds the testimony regarding the movability of the concrete barriers, the availability of padding, and the staffing of Corner 10 was sufficient for the jury to return a verdict in favor of plaintiff against SFX. The evidence was sufficient for the jury to reach the conclusion that SFX had reason to believe Corner 10 and its run-off area were dangerous, or the presence of the concrete barriers, lack of padding, or placement of inexperienced corner workers presented obvious risks,

and SFX recklessly disregarded its realization of these dangers.

IV. SFX's Alternative Motion for a New Trial[16]

A. Procedural Standards

Motions for new trial are committed to the sound discretion of the trial court.[17] They are generally regarded with disfavor and should only be

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[16] While the jury was deliberating, the defendants moved for a new trial or, in the alternative, a mistrial, based on the jury's request for and possible use of a ruler (doc.136); without the trial judge's knowledge or permission, a bailiff had granted the jury's request for a ruler. Presumably the jury wanted a ruler to measure certain distances as depicted on aerial photographs and diagrams of the track that were admitted into evidence, as there was a significant dispute by the parties as to how much run-off area was available at Corner 10. The court allowed the parties to brief the issue and convened a hearing on the record to hear oral argument on their motion, of course outside the jury's presence (*see* docs. 136-38). Ultimately, the undersigned deferred ruling on the issue, with the understanding it would be taken up only in the event that the jury returned a plaintiff's verdict. After the jury returned its verdict against SFX, the above-described motion was orally renewed by SFX. By agreement and order, the undersigned denied that motion, without prejudice to being reasserted in SFX's written post-trial motions (*see* doc. 152). But SFX has not raised the issue in the pending post-trial motions. Accordingly, the court considers this issue abandoned.

[17] *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984); *Hinds v. Gen. Motors Corp.*, 988 F.2d 1039, 1046 (10th Cir. 1993).

granted with great caution.[18] A "party seeking to set aside a jury verdict must demonstrate trial errors which constitute prejudicial error or that the verdict is not based on substantial evidence."[19]

B. Comparative Fault

SFX seeks a new trial based on the court's decision not to instruct the jury on comparative fault principles. Of course, "[t]he decision whether to give or exclude a particular jury instruction is committed to the sound discretion of the trial court."[20] "In reviewing jury instructions, the court must determine if the instructions properly state the law and provide the jury with ample understanding of the issues and the standards applicable."[21] "The instructions must cover the issues presented by the evidence and accurately state law."[22] "A new trial is warranted only when a

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[18] *Franklin v. Thompson*, 981 F.2d 1168, 1171 (10th Cir. 1992).

[19] *White v. Conoco, Inc.*, 710 F.2d 1442, 1443 (10th Cir. 1983).

[20] *Audiotext Commc'ns. Network, Inc. v. US Telecom, Inc.*, No. 94-2395, 1996 WL 568839, at *5 (D.Kan. Sept. 4, 1996) (citing *City of Wichita v. United States Gypsum Co.*, 72 F.3d 1491, 1495 (10th Cir. 1996)).

[21] *Crumpacker v. State*, No. 00-4044, 2004 WL 3186196, at *3 (D. Kan. Oct. 6, 2004) (citing *Big Horn Coal Co. v Commonwealth Edison Co.*, 852 F.2d 1259, 1271 (10th Cir. 1988)); *see also Audiotext*, 1996 WL 568839, at *5 (citing *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1517 (10th Cr. 1995))

[22] *Crumpacker*, 2004 WL 3186196, at *3 (citing *United Sates v. Davis*, 953 F.2d 1482, 1492 (10th Cir. 1992)).

failure to give an instruction is prejudicial in view of the entire record."[23]

Instead of defendants, it was plaintiff who initially raised the issue of comparative fault by way of a motion in limine (doc. 96), asking the court to preclude any reference during trial to the plaintiff's alleged comparative fault or assumption of risk. For the benefit of context, the court notes here its extensive discussion of this issue in the limine order, as follows:

> Plaintiff asserts that comparative fault principles, as a matter of law, do not apply to claims for wanton conduct. Defendants disagree.
>
> . . .
>
> Plaintiff cites the Tenth Circuit Court of Appeals' decision in *Wolfgang v. Mid-America Motorsports, Inc.* 111 F.3d 1515 (10th Cir. 1997). . . for the unqualified proposition that Kansas comparative fault principles have zero application to claims for wanton conduct. In that case, which involved a race car crash, the Tenth Circuit held that the trial judge had not abused his discretion in excluding evidence of a pre-race release and the plaintiff's fault. *Id.* at 1527-28.

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[23] *Id.* (citing *United States v. Martin*, 18 F.3d 1515, 1519 (10th Cir. 1994)).

Wolfgang seems quite similar to the instant case in that both involved commercially sponsored races in the State of Kansas where the plaintiff had executed a broad form release before the race. But the court respectfully disagrees with plaintiff that *Wolfgang* necessarily and absolutely precludes admission of all evidence of comparative fault in all cases where wanton conduct is the only claim presented to the jury at trial. Although the Tenth Circuit did state that "in a wantonness case, liability could only be negated if the plaintiff's actions were the sole cause of his injuries," it also pointed out that "a finding of wantonness requires consideration of all the facts and circumstances surrounding the crash." *Id.* (citing *State v. Betts*, 519 P.2d 655 (Kan. 1974); *Friesen v. Chicago, Rock Island & Pacific R.R.*, 524 P.2d 1141 (Kan. 1974)). Further, it is extremely important to keep in mind that the plaintiff in the *Wolfgang* litigation had admitted that his accident was his fault. *Id.* ("[T]he issue in the case was not the cause of his accident, but the cause of his extensive burns."). In contrast, in the case at bar, while Mr. Wagner has indicated a willingness to stipulate that he lost control of his motorcycle and that led directly to the crash, the damages he seeks are much broader than those that were sought by Mr. Wolfgang. The plaintiff in the present case seeks damages not only for the serious burns

and injuries he claims he sustained due to defendants' alleged failure to timely aid him after the accident, but also for injuries he claims were due to the crash itself. Accordingly, the court is inclined to find *Wolfgang* factually distinguishable, or at a minimum that plaintiff reads that case too broadly.

Highly summarized, plaintiff argues: (1) comparative fault principles apply only to the extent that contributory negligence would have been a viable defense to a claim before the Kansas comparative fault statue was enacted in 1974 (K.S.A. § 60-258a); (2) as a matter of law, ordinary negligence was not a viable defense to a claim for wanton conduct before the comparative fault statute went into effect; and (3) therefore, defendants in the case at bar cannot rely on plaintiff's alleged fault (which nobody suggests constitutes wanton conduct) as a basis to compare fault under K.S.A.§ 60-258a. This argument has some merit, but only goes so far.

Unfortunately, and all of the parties agree on this point, the Kansas statute regarding comparative negligence, K.S.A. § 60-258a, does not clearly articulate whether it applies to claims for wanton conduct. Of course, allegedly wanton conduct in a Kansas

tort case typically comes into play with the plaintiff pleading his claim in terms of ordinary negligence, with a separate request for an award of punitive damages based on the standard pattern jury instruction that refers to "willful, wanton, or malicious" conduct. Here, though, because of the obvious impediment presented by the release plaintiff signed before the race, the defendants' alleged wanton conduct is the predicate to plaintiff's theory of recovery, as opposed to a basis to seek punitive damages. Indeed, making this case even more atypical, plaintiff's counsel confirmed during the limine conference that they had made the strategic decision not to ask the jury for punitive damages, even if a verdict finding wanton conduct is secured.

The parties have provided some briefing (and extensive oral argument) on the issue of whether Kansas comparative fault principles apply in a situation such as presented in this case, where the *only* tort alleged is wanton conduct. But neither plaintiff nor defendants have cited any case that is directly on point.

Unfortunately, neither plaintiff nor defendants looked far enough down-field and timely filed a motion for partial summary judgment, which would have allowed this potentially pivotal issue to

be developed in the context of a well-developed record instead of hastily prepared briefs on the eve of trial. And, the parties have declined to accept the undersigned trial judge's practical suggestion that they agree to have this issue certified to the Kansas Supreme Court before a time-consuming and expensive trial, which evidently will include many out-of-state witnesses and expensive retained experts.

Given the record as it now stands, the undersigned observes that, despite *Wolfgang*, there is considerable persuasive authority for the proposition that, barring a factual stipulation rendering the issue moot, comparative fault principles should be applied in any Kansas personal injury case that alleges less than intentional conduct. *See Wheeler v. Mo. Pac. R.R. Co.*, No. 88-1231, 1988WL 142421, at *3 (D.Kan. Dec. 14, 1998) (holding that the Kansas comparative fault statue "encompasses all personal injury actions even if wanton conduct is alleged."). *See also Bowman v. Doherty*, 686 P.2d 112 (Kan. 1984) (in legal malpractice case involving evidence of wanton conduct, court applied comparative fault principles to determine actual damages, but not punitive damages); *Sandifer Motors, Inc. v. Roeland Park*, 628 P.2d 239, 248 (Kan. Ct. App. 1981) (flood nuisance case,

stating that "where tort liability is predicated on conduct less culpable than 'intentional,' the general rule is to compare fault and causation.").

Even though plaintiff raised the comparative fault dispute via his motion in limine, from a trial management perspective, it is noteworthy that plaintiff also argues that whether comparative fault principles apply to this case may be moot because supposedly there is no evidence showing that plaintiff was at fault at all. In light of the sparse and conflicting case law presented thus far on point, and in light of plaintiff's optimistic forecast about the nature of the anticipated evidence, the court will exercise its discretion and deny plaintiff's motion in limine to exclude evidence of comparative fault. But, the court intends to closely monitor and tightly rein any evidence proffered by defendants along the lines of comparative fault, particularly given that defense counsel have represented this evidence will be essentially confined to plaintiff's alleged failure to notice and then raise concerns about the safety of the barrier near Turn 10 of the track during the pre-competition runs. Stated more directly, under the circumstances, it would seem that defendants need only refer to this once during opening statement, establish it a single time during plaintiff's cross-

> examination, and wrap things up with a short statement during closing argument – the court will *not* allow defendants to beat this drum endlessly.
>
> The court intends to revisit this issue of comparative fault at the close of evidence and instruct the jury according to its determination at that time. Should the court conclude at that juncture that comparative fault does not apply, either as a matter of law or due to a lack of competent supporting evidence, then the court would be strongly inclined to give an appropriate limiting and cautionary jury instruction. Plaintiff is invited to propose such an instruction well in advance of the conference that will be held pursuant to Fed. R. Civ. P. 51.

Doc. 120 at 4-9 (footnotes omitted).

During the instructional conference that was conducted toward the end of trial in accordance with Fed. R. Civ. P. 51, the court announced its decision to decline to instruct the jury as to comparative fault in the light of the lack of evidence showing plaintiff was at fault. Consistent with their pretrial position, the defendants again made brief reference to plaintiff's failure to complain about any allegedly unsafe conditions on the track after his pre-race practice run, and further that the evidence showed plaintiff took Corner 10 too fast and lost control of his motorcycle, thus causing the crash and his ensuing injuries.

Given the record presented, the court remains of the view that there was no showing of fault on the part of plaintiff. Even though the boilerplate release form that plaintiff signed before the race purported to impose a duty to inspect on plaintiff, the court simply is unpersuaded that the mere failure by plaintiff to notify defendants their track was dangerously configured constitutes "fault" on his part for purposes of K.S.A. § 60-258a. And, as to going fast around Corner 10, that is precisely what competitive racers are expected to do and thus it is difficult to deem that fault within the meaning of the comparative fault statute. This effectively renders moot the issue of whether comparative fault applies to cases involving claims for wanton conduct. But in any event the court is now of the view it would have been improper, as a matter of law, to compare wanton conduct with conduct consisting at most, of simple negligence.

Regardless, the terms of whether SFX suffered any prejudice, it is important to remember that the court instructed the jury in this case as follows:

> During this trial, you have heard evidence concerning the conduct of plaintiff and other racers in the race in which plaintiff participated. You also have heard evidence about the agreement plaintiff signed before the race, setting forth the responsibility of racers to report safety hazards. This evidence has been admitted by the court for a limited purpose. That is, you may consider this evidence only as it may be relevant to

> plaintiff's claim that defendants acted wantonly.

Doc. 135, Instruction 16. The court concludes it was not prejudicial error to refuse to instruct the jury as to comparative fault. The above-described instruction was proper. SFX is not entitled to a new trial on this basis.

C. Wantonness v. Negligence

SFX also seeks a new trial on the basis that the court's preliminary and final instructions regarding wanton conduct were improper because they did not adequately distinguish claims for ordinary negligence from claims of wanton conduct. As noted above, the court's wanton conduct instruction was closely patterned after Judge Vratil's memorandum and order granting in part the defendants' motion for summary judgment.[24] This instruction properly state the law and provided the jury with ample understanding of the issues presented by the evidence and the applicable standards. The decision to exclude instructions as to ordinary negligence, which all agree was not a claim by plaintiff that remained in the case at trial, was certainly within the court's discretion. As stated during trial, to minimize potential jury confusion, the court simply chose to instruct the jury as to what this case is about, not as to what it is not about. Therefore, the court finds its refusal to give SFX's proposed

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[24] *See* Jury Instruction No. 15 (doc. 135 at 18-19) and Judge Vratil's memorandum and order (doc. 66)

instruction on this basis does not constitute prejudicial error.

D. Subsequent Remedial Measures

SFX argues the court erred by admitting Exhibit 73a, which is an aerial photograph showing the run-off area at Corner 10. This photograph was taken after the accident in question and, more to the point, after Heartland Park had removed the concrete barrier outside of Corner 10. In the photograph, the concrete barrier removed after plaintiff's accident is depicted as a dark line; the other barriers depicted in Exhibit 73a are shown as white lines.

Before trial, consistent with Fed. R. Evid. 407's general proscription against the use of evidence of a defendant's subsequent remedial measures, the court granted defendants' motion in limine to exclude evidence regarding changes that were made to the track after plaintiff's accident; the court so ruled because none of the various exceptions to Rule 407 were applicable, i.e., defendants stipulated Heartland Park had control over the barrier outside of Corner 10 and that it was feasible to move the barrier with the proper equipment (*see* doc. 120 at 13).

During trial, plaintiff moved to admit Exhibit 73a, a post-remedial measures photograph which had been discreetly retouched so as to show the barrier in question. Defendants objected on the basis it did not accurately depict where the barrier was located at the time of the accident and that the jury would believe the barrier was completely removed. After closely

reviewing the revised exhibit, the court overruled defendants' objection, reasoning that the dark line reasonably depicted the barrier outside Corner 10.

The court respectfully disagrees with SFX's assessment of Exhibit 73a. Plaintiff adequately established the dark line accurately represented the placement of the barrier at the time of the accident. Further, the court is unpersuaded the dark line, as opposed to a white line, constituted evidence of subsequent remedial measures beyond the scope of the limine ruling. In this regard, it is important to remember there was no testimony presented to the jury as to when the photograph was taken. No evidence was presented during trial that defendant had moved the barrier outside Corner 10 after plaintiff's accident; whether in response to the accident or otherwise. Thus, the admission of Exhibit 73a clearly was not prejudicial error.

E. Future Medical Expenses

SFX argues the evidence was insufficient to support the jury's award of $213,750 for future medical expenses. Specifically, SFX contends plaintiff did not present sufficient evidence of the cost of any future medical procedures that plaintiff may undergo. Plaintiff argues there was ample evidence of the future medical expenses that plaintiff will incur over the rest of his life due to the accident at Heartland Park.

The court, as mentioned earlier, has the discretion to grant a new trial if a verdict appears to be

against the weight of the evidence.[25] But as a general rule the court must be mindful not to usurp the role of the jury, and must exercise its discretionary power only in exceptional circumstances where the verdict was clearly against the weight of the evidence.[26] "A new trial is not warranted simply because the court would have reached a different verdict."[27] A party seeking to set aside a jury verdict, "bear[s] the heavy burden of demonstrating that the verdict was clearly, decidedly, or overwhelmingly against the weight of the evidence."[28] In considering SFX's motion for new trial, the court must view the evidence in a light most favorable to plaintiff.[29]

It is true plaintiff did not present evidence of the specific amounts of his anticipated future medical expenses. Nevertheless, the court finds there was sufficient evidence and testimony from which the jury could estimate or infer that plaintiff would incur future medical expenses in the amount of $213,750. John Woeste, M.D. testified he recommended plaintiff see a neurosurgeon to discuss his options for future

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[25] *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1125 (10th Cir. 1995).

[26] *Rivera v. Rivera*, 262 R. Supp.2d 1217, 1230-31 (D. Kan. 2003) (citation omitted).

[27] *Hillman v. U.S. Postal Serv.*, 169 F. Supp.2d 1218, 1222 (D. Kan. 2001) (citation omitted); *accord Boyce v. Bd. of County Comm'rs*, 857 F. Supp. 794, 797 (D. Kan. 1994).

[28] *Blanke v Alexander*, 152 F.3d 1224, 1236 (10th Cir. 1998) (internal quotations and citations omitted)

[29] *Griffin v. Strong*, 983 F 2d 1544, 1546 (10th Cir. 1993).

surgery on his lower back, such as spine fusion. Dr. Woeste also described the pain management techniques he has prescribed for plaintiff and indicated plaintiff would continue to need pain management care for the remainder for his life. Dr. Woeste testified plaintiff is likely to develop post-traumatic arthritis in several of his joints as he ages.

Dr. Woeste's testimony was buttressed by Todd Northrup, M.D., who performed knee surgery on plaintiff in 2005. In his opinion, plaintiff will have post-traumatic arthritis in his knee, back, hip, and shoulder. He was expected to perform plaintiff's upcoming shoulder surgery and testified plaintiff would need approximately two to three sessions of physical therapy for the shoulder per week for twelve weeks following the surgery.

Exhibit 98ii is a summary of plaintiff's medical bills from the time of the accident up to 2007. The total is shown as $881,650.51. Plaintiff's medical expenses are itemized in Exhibit 98A-I, 98S-U, 98AA-CC, 103, and 106. The jury was also instructed that plaintiff's remaining life expectancy is 38.2 years.[30]

From all the foregoing evidence, the court finds the jury could properly infer plaintiff would incur $213,750 in future medical expenses over the remainder of his life. To be sure, given plaintiff's fairly good recovery, a much lower award for future medical expenses also would have been within the evidence. But the court cannot say the jury's determination that

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[30] Doc. 135, Instruction No. 18

plaintiff was entitled to recover the specified amount was clearly, decidedly, or overwhelmingly against the weight of the evidence.

V. SFX's Motion to Alter or Amend the Judgment Based on the Kansas Statutory Cap on Noneconomic Damages

SFX's motion to alter or amend the judgment raises two issues: (1) the jury's award of future medical expenses; and (2) application of the Kansas statutory cap on noneconomic damages. As discussed above, the court finds plaintiff presented sufficient evidence to support the award of future medical expenses. Thus, SFX's motion to alter or amend the judgment as relates to the first issue is denied.

As concerns noneconomic damages, the record reflects the parties' stipulation during the final pretrial conference that the substantive issues in this case are controlled by Kansas law.[31] Under Kansas law, specifically, K.S.A. § 60-19a02b, "[i]n any personal injury action, the total amount recoverable by each party from all defendants for all claims for noneconomic loss *shall not* exceed a sum total of $250,000" (emphasis added). According to subsection (d) of K.S.A. § 60-19a02, "[i]f the verdict results in an award for noneconomic loss which exceeds the limit of this section, the court *shall* enter judgment for $250,000 for all party's claims for noneconomic loss" (emphasis added).

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[31] *See* pretrial order. (doc. 62¶ 3(d)).

Here, the jury awarded plaintiff $264,625 for noneconomic loss to date, $758,150.62 for future noneconomic loss, and $263,380.91 for loss or impairment of services as spouse, for a combined total of $1,286,156.53 in noneconomic loss. These awards were in addition to $647,875 for past medical expenses, $213,750 for the previously discussed future medical expenses, and $380,086 in future economic loss, for a combined total of $1,241,711 in economic losses.

As a matter of law, the court finds, pursuant to the Kansas statutory cap, the portions of the jury's award for noneconomic loss to date and for future noneconomic loss must be reduced. That is, the jury's award of such damages in the amount of $1,286,156.53 must be reduced. That is the jury's award of such damages in the amount of $1,286,156.53 must be reduced to $250,000.

SFX argues the $263,380.91 award of loss or impairment of services as spouse is subject to the statutory cap. As discussed in *Wolfgang v. Mid-America Motorsports, Inc.*, 914 F.Supp. 434, 438-39 (D.Kan. 1996), *aff'd* 111 F.3d 1515, 1529 (10th Cir. 1997), this determination depends on whether loss of consortium claims are economic or noneconomic in nature. Jury Instruction No. 19 (doc. 135 at 24) states as follows:

> If you find for the plaintiff, you may allow a sum which will constitute fair and reasonable compensation for the loss or impairment of plaintiff's ability to

> perform services as a husband resulting from injury sustained by him.
>
> If arriving at the amount of recovery, you should consider the loss or impairment of plaintiff's ability to perform services in the household and in the discharge of this domestic duties, and the loss or impairment of plaintiff's companionship, aid, assistance, comfort and society.

There is some evidence about the types of household services plaintiff provided before and after his accident. But there was *no* evidence at trial regarding the monetary value of household services in this case. Accordingly, the court finds the statutory cap applies to the entire loss of consortium award.[32]

Plaintiff argues SFX did not properly preserve the application of the statutory cap as an affirmative defense in the pretrial order. Of course, under Fed. R. Civ.P. 16(e), the pretrial order controls the subsequent course of the case and evidence or legal theories that are not at least implicitly raised in the pretrial order are generally barred at trial unless admitted without objection.[33] Although SFX did not specifically state in the pretrial order the Kansas statutory cap would

[32] *See Wolfgang*, 914 F. Supp. at 439 (citing *Fenstermacher v. Telelect, Inc.*, No. 90-2159, 1992 WL 175114, at *13 (D. Kan. July 17, 1992); *Marely v. Chem. Waste Mgmt., Inc.*, No. 91-1487, 1993 WL 390055, at *3 (D. Kan. Sept. 27, 1993)).

[33] *Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002).

apply to any damages awarded by the jury, the court finds SFX did not waive application of the statutory cap. In the court's view, there was no need to plead the cap as an affirmative defense. That is, especially given the unambiguous and mandatory language in the applicable Kansas statute about caps on noneconomic damages, and given that the pretrial order recites the parties' stipulation that Kansas substantive law is controlling, the court is wholly unpersuaded by the cases cited by plaintiffs that SFX had to specifically plead the damages cap in the pretrial order.[34] Nor is the court persuaded that plaintiff got sand-bagged by SFX by making any strategic or tactical decisions in reliance upon the assumption that the cap was inapplicable.[35]

VI. Conclusion and Order

In consideration of the foregoing,

IT IS HEREBY ORDERED:

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[34] *See, e.g., Bentely v. Cleveland County Board of County Comm'rs*, 41 F.3d 600 (10th Cir. 1994); *Flenory v. Eagle's Nest Apartments*, 28 Kan. App.2d 906, 22 P. 3d 613 (2001).

[35] In his responsive brief, plaintiff argues that there are at least six tactics available to litigants to avoid the effects of Kansas damage caps (doc. 162 at 4-5). But conspicuously missing from plaintiff's response is any credible evidence (by affidavit or otherwise) that any of these purported tactics actually were considered by his attorneys before or during trial.

1. SFX's motion for judgment as a matter of law, or in the alternative, for a new trial (doc. 157) is denied.

2. SFX's motion to alter or amend the judgment (doc. 159) is granted in part and denied in part. That is, the motion is granted with regard to the recoverable total amount of noneconomic damages, but the motion is denied with specific regard to the jury's award of future medical expenses.

3. The Clerk shall file an amended judgment in plaintiff's favor against SFX for $1,491,711, plus the costs of this action. Plaintiff's claims against Heartland Park shall remain dismissed, with prejudice.

Dated this 27th day of November, 2007, at Kansas City, Kansas.

s/James P. O'Hara
James P. O'Hara
U.S. Magistrate Judge

APPENDIX C

Case: 2:05-cv-02336-KHV Document 66
Filed 10/27/2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ARTHUR C. WAGNER, JR., individually and ARTHUR C. WAGNER, JR., for the benefit of JEAN MARIE WAGNER,	)	
	)	CIVIL ACTION
Plaintiff,	)	
v.	)	Case No. 05-2336-KHV
SFX MOTOR SPORTS, INC., et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

Arthur C. Wagner, Jr., individually and on behalf of his wife, Jean Marie Wagner, brings suit against SFX Motor Sports, Inc. d/b/a Clear Channel Entertainment-Motor Sports, SFX Entertainment, Inc. d/b/a Clear Channel Entertainment, Clear Channel Communications, Inc., Jayhawk Racing Properties, L.L.C., and Heartland Park Raceway, L.L.C. Plaintiff

alleges ordinary negligence, wanton conduct and loss of consortium arising out of injuries which he sustained while competing in a motorcycle race on August 8, 2003. This matter comes before the Court on Defendants' Motion for Summary Judgment (Doc. #54) filed July 17, 2006. For reasons set forth below, the Court sustains defendants' motion in part.

Legal Standards

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. Civ. P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Vitkus v. Beatrice Co., 11 F.3d 1535, 1538-39 (10th Cir. 1993). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. Id. at 252.

The moving party bears the initial burden of showing the absence of any genuine issue of fact. Celotex Corp. V. Catrett, 477 U.S. 317, 323 (1986); Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991). Once the moving party meets its burden, the nonmoving party must demonstrate that genuine issue remain for trial "as to those dispositive matters for which it carriers the burden of proof." Applied Genetics Int'l, Inc. v. First Affliated §, Inc., 912 F.2d 1238, 1241 (10th Cir. 1990); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87

(1986); Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991). The nonmoving party may not rest it's the pleadings but must set forth specific facts in opposition of the motion. Applied Genetics, 912 F.2d at 1241.

The Court must view the record in the light most favorable to the party opposing the motion for summary judgment. Deepwater Invs., Ltd., v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir. 1991). Summary judgment may be granted if the nonmoving party's evidence is merely colorable or is not significantly probative. Anderson, 477 U.S. at 250-51. "In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial." Conaway v. Smith, 853 F.2d 789, 794 (10th Cir. 1988). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52.

Factual Background

The following facts are uncontroverted, deemed admitted, or, where disputed, viewed in a light most favorable to plaintiff.

On August 8, 2003, Arthur Wagner wrecked his motorcycle while competing in the Formula USA 250K Team Challenge Endurance Race at Heartland Park Topeka racetrack in Topeka, Kansas. The City of

Topeka owned the racetrack, but it had assigned the right to operate the racetrack to Jayhawk Racing Properties, L.L.C. ("Jayhawk").[1] Jayhawk in turn had assigned its right to operate the racetrack to Heartland Park Raceway, L.L.C. ("Heartland").[2]

On March 1, 2003, Heartland entered into a track rental agreement with SFX Motor Sports, Inc d/b/a Clear Channel Entertainment-Motor Sports ("SFX Motor Sports").[3] In the agreement, Heartland authorized SFX Motor Sports to stage Formula USA Series and Championship Cup Series ("CCS") motorcycle races at the racetrack from August 8 through 10, 2003. The track rental agreement provided in pertinent part as follows:

> This contract is entered into as of the 1st day of March, 2003 by and among HEARTLAND PARK RACEWAY, LLC, a Kansas limited liability company (hereinafter referred to as "HPT" or "Lessor"), and [SFX Motor Sports, Inc.

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[1] The record does not contain the agreement between the City and Jayhawk, but plaintiff admits that the City made such an assignment.

[2] The record does not contain the agreement between Jayhawk and Heartland, but plaintiff admits that Jayhawk made such an assignment.

[3] SFX Entertainment, Inc. d/b/a Clear Channel Entertainment ("SFX Entertainment") and Clear Channel Communications, Inc. ("Clear Channel") are affiliates of SFX Motor Sports, but they had no involvement with respect to the Formula USA or CCS events which occurred at the racetrack in August of 2003.

d/b/a Clear Channel Entertainment - Motor Sports] (hereinafter referred to as "Lessee").

***

1. HPT will make available to Lessee specific areas of the premises commonly known as Heartland Park Topeka . . ., consisting primarily of a drag strip, road racing course, dirt track, off-road facilities and ancillary buildings, for the purpose indicated on Exhibit A (the "Event").

***

11. HPT requires that there be a minimum of one (1) licensed and staffed Paramedic Ambulance on the Premises during all events. The cost of [two] staffed Paramedic Ambulance[s] [on duty from 8:00 AM until 6:00 PM, each day] shall be included in the Track Rental.

12. HPT will furnish the following equipment for use of Lessee: Fire Extinguishers: 10 and 20 lbs. charged; Oil Dry; Shovels; Brooms; and Water Jugs. In addition, one (1) wrecker, one flatbed truck and one (1) fire truck are also available for use.

13. HPT will provide a marked location for all corner workers who must remain within the marked areas, except as may be specifically required to perform their duties.

***

20. Lessee warrants and represents that all racing or on-track activities shall be conducted in accordance with the rules and regulations of the

> governing sanctioning body in effect as of the date of the Event. Lessee shall be responsible for enforcing . . . all rules and regulations. Lessee shall also be responsible for the conduct of all workers, officials, spectators, guests or other parties on the Premises during the terms of this Agreement, as well as the safe conduct of the Events. Lessee shall establish a minimum level of staffing necessary for the conduct of on-track activities and shall inform HPT of the minimum. Lessee shall not conduct any on-track activities unless the minimum requirement is met. If HPT determines, in its sole discretion, that inadequate staffing is in place, HPT may place additional workers on location at the expense of Lessee. HPT MAKES ABSOLUTELY NO WARRANTIES, EITHER EXPRESSED OR IMPLIED concerning the safety of any persons or property as a result of complying with the requirements of this Agreement. Lessee acknowledges that motor sports activities are hazardous and participation can lead to serious or fatal injury; the hazards of motor sports are known to its members; and its members, participants, their crews and guests have assumed the risk of any injury by choosing to participate and attend the event at the Premises.

Exhibit N to Defendant's Memorandum In Support Of Motion For Summary Judgment ("Defendant's Memorandum") (Doc. #55) filed July 17, 2006.

Some time in 2003, before the races in August, Heartland entered into an oral agreement with Great

American Management ("GAM") by which it delegated some duties to GAM, including opening the gates of the racetrack, preparing the bathrooms, ensuring that the public address system worked and providing water.

Before the race on August 8, plaintiff signed a release and waiver of liability. The waiver provided in pertinent part as follows:

IN CONSIDERATION (a) of being permitted to compete . . . EACH OF UNDERSIGNED, for himself/herself, his/her personal representatives, parent or legal guardian, heirs, and next of kin:

***

2. HEREBY RELEASE, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE SFX Motor Sports, Inc., d/b/a Clear Channel Entertainment-Motor Sports, and its affiliates and related companies including specifically SFX Entertainment, Inc., d/b/a Clear Channel Entertainment, Clear Channel Communications, [I]nc., . . . track operators, . . . owners and lessees of premises used to conduct the Event(s), . . . all for the purposes herein referred to as "Releasees", FROM ALL LIABILITY TO THE UNDERSIGNED, his personal representatives, parent or legal guardian, assigns, heirs, and the next of kin FOR ANY AND ALL LOSS OR DAMAGE, AND ANY CLAIM OR DEMANDS THEREFORE ON ACCOUNT OF INJURY TO THE PERSON OR PROPERTY, OR RESULTING IN DEATH, OF THE UNDERSIGNED ARISING OUT OF OR

RELATED TO THE EVENT(S), WHETHER CAUSED, IN WHOLE OR IN PART, BY THE SOLE OR CONCURRENT NEGLIGENCE OR WRONGDOING, STRICT LIABILITY OR FAULT OF THE RELEASEES OR OTHERWISE.

Exhibit J to Defendant's Memorandum at 14.[4]

During the race, plaintiff's motorcycle entered corner 10 of the racetrack at a speed of 100 to 130 miles per hour, and began to slide. The motorcycle hit a speed bump, and plaintiff and the motorcycle slid across the grass and dirt on the outside of corner 10 (the "run-off" area) into an unprotected concrete barrier approximately 25 to 50 feet away. The collision ignited a fire which engulfed both plaintiff and the motorcycle, and plaintiff suffered severe injuries.

Before the race, Keith Abbott and Kevin Elliott, who worked for SFX Motor Sports, made a few trips around the racetrack to identify primary target zones of impact. Gordon Spieckerman, another employee of SFX Motor Sports, rode his motorcycle around the racetrack to inspect the track condition and corners. The day before plaintiff's accident, at least three motorcycles ran off the racetrack at corner 10 at slower than competition speed. Before the race, track operators placed tires in front of the section of the concrete barrier around corner 10 which William

[4] The waiver does not specifically identify Jayhawk and Heartland, but the terms "track operators" and "owners and lessees of premises used to conduct the Event(s)" are sufficient to encompass these defendants.

Ritger, a part-time employee of SFX Motor Sports, considered to be the "big impact zone" of that corner. Exhibit F to Defendant's Memorandum at 64. Track operators placed no tires or other safety devices in front of the rest of the concrete barrier surrounding corner 10, so about 70 feet of the barrier lacked additional protection. Plaintiff's accident occurred in an area of corner 10 with an unprotected concrete barrier.

During the race, track operators placed corner workers in stations along the racetrack. The corner workers acted as flaggers to inform the racers to proceed with caution or stop altogether in the event of an accident. They also served as emergency responders by helping downed racers if necessary. The track rental agreement stated that Heartland would provide marked locations for the corner workers. At each corner station, Heartland placed two fire extinguishers and a radio to communicate with the corner tower. Although Heartland hired some of the corner workers through a temporary employment agency, SFX assumed primary responsibility for hiring and training corner workers.

On August 8, with Spieckerman's help, Ritger placed corner workers around the track. Ritger assigned two corner workers, Randy and Linda Bodtke, to corner 10. No defendant asked the Bodtkes if they had prior experience as corner workers, and Randy Bodtke had no prior experience. Linda Bodtke was receiving social security disability relating to her back condition and asthma, and she had only served as a corner worker some 20 years earlier at a circular dirt track. Ritger stationed both Bodtkes on the inside of

the corner, and no corner workers were outside of corner 10. After plaintiff crashed on the outside of corner 10, oncoming racers delayed Randy Bodtke in reaching plaintiff.

Corner workers received instruction from track operators on using flags to communicate with racers during the race. Track operators instructed corner workers that they could not use a red flag to stop a race without authorization from the control tower. On August 8, when Linda Bodtke sought to stop the race for plaintiff's accident, this authorization was delayed. Also, Linda Bodtke had been instructed to hold the red flag still as she displayed it to the racers. Typical pre-race training instructed corner workers to waive the red flag aggressively in such a situation. The corner workers received no instruction or training on proper use of fire extinguishers in case a rider caught on fire. No corner worker ever attempted to help plaintiff. The fire that engulfed him and his motorcycle burned until it ran out of fuel.

On the day of the race, Heartland provided two staffed ambulances pursuant to the track rental agreement. The first ambulance arrived approximately five minutes after the accident, but the emergency personnel in that ambulance did not attempt to help plaintiff. It was not until the second ambulance arrived approximately 12 minutes after the accident, that any emergency personnel began to render aid. The record contains no evidence that Heartland of SFX Motor Sports used the wrecker, flatbed truck or fire truck to respond to the crash site.

Analysis

Plaintiff claims that defendants acted with negligence and wantonness in disregarding the danger of the unprotected concrete wall and failing to provide adequate emergency response to the crash. Plaintiff seeks damages for his loss and loss of consortium on behalf of his wife. Defendants seek summary judgment on all claims, arguing that as a matter of law (1) Jayhawk, Heartland, SFX Entertainment and Clear Channel owed no duty of care to plaintiff; (2) any duty of care that existed was properly discharged; and (3) plaintiff's loss of consortium claim cannot be maintained without an underlying cause of action.

1. Duty

To establish negligence under Kansas law, plaintiff must prove (1) the existence of a duty, (2) defendants' breach of that duty, (3) injury and (4) causation between the breach and the injury. South v. McCarter, 280 Kan. 85, 94, 119 P.3d 1, 8 (2005). A claim of wanton conduct also requires defendants' breach of an applicable duty. See Elliott v. Peters, 163 Kan. 631, 636 , 185 P.2d 139, 144 (1947). Jayhawk, Heartland, SFX Entertainment and Clear Channel argue that they did not owe a duty of care to plaintiff.[5]

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[5] SFX Motor Sports does not dispute that it owed a duty to plaintiff. From the record, it appears that SFX Motor Sports owed a duty to ensure safe racing conditions and to employ only competent workers. See Wolfgang v. Mid-Am. Motorsports, Inc., 111 F.3d 1515, 1524 (10th Cir 1997) (duty of care evidenced by responsibility for safety measures); Plains Res., Inc. v. Gable, 235

(continued .)

The existence of a duty under Kansas law is grounded in foreseeability; "[a]n injury is foreseeable so as to give rise to a duty of care where a defendant knows or reasonably should know that an action or the failure to act will likely result in harm." Gragg v. Wichita State Univ., 261 Kan. 1037, 1056, 934 P.2d 121, 135 (1997). Although the existence of a duty is ultimately a question of law, see Miller v. Dillard's, Inc., 166 F. Supp.2d 1326, 1331 (D.Kan. 2001), foreseeability is a fact-driven inquiry to be decided by the jury, see Gardin v. Emporia Hotels, Inc., 31 Kan. App.2d 168, 175, 61 P.3d 732, 738 (2003). The Court may determine foreseeability as a matter of law only where the record contains no evidence that the cause of plaintiff injuries was foreseeable. Id.

A. Duty Owed By Jayhawk

Jayhawk acquired from the City of Topeka the right to operate Heartland Park Topeka racetrack for public entertainment. As the general concessionaire, Jayhawk retained a duty to exercise reasonable and ordinary care for the safety of the premises unless it divested itself of all responsibility for operation of the facility. See Griffin v. Rogers, 232 Kan. 168, 179, 653 P.2d 463, 471-72 (1982). Before August of 2003, Jayhawk assigned its right of operation to Heartland,

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[5](. continued)
Kan. 580, 591, 682 P.2d 653, 662 (1984) (employer has duty to hire and retain competent employees); McDonnell v. Music Stand, Inc., 20 Kan. App.2d 287, 293, 886 P.2d 895, 900 (1995) (employer has duty to hire competent independent contractors where safety at risk) These duties closely resemble the duties which Heartland owed to plaintiff, explained below.

which leased the track to Heartland, which leased the track to SFX Motor Sports for motorcycle races on August 8 through 10, 2003. Plaintiff admits that this assignment divested Jayhawk of all supervisory control over the motorcycle races held at the racetrack during that period. The record contains no evidence that Jayhawk was involved in the race. The Court therefore finds that Jayhawk owed no duty to plaintiff. Defendants' motion for summary judgment as to plaintiff's negligence claim against Jayhawk is sustained.

B. Duty Owed By Heartland

Through its agreement with Jayhawk, Heartland assumed control of the operation of the racetrack. Heartland then entered into agreements with both SFX Motorsports and GAM to conduct certain aspects of the races on August 8 through 10. Heartland argues that these arguments relieved it of its duty to plaintiff. The Court disagrees.

i. Heartland's Agreement With SFX Motorsports

Heartland entered into a written lease agreement with SFX Motor Sports which allowed SFX Motor Sports to stage motorcycle races at the facility from August 8 through 10, 2003. In the track rental agreement, however, Heartland retained significant supervisory authority. Under the agreement, Heartland retained the right to mark the location of all corner workers. Heartland also provided two staffed ambulances during the days of the races, as well as

fire extinguishers, a wrecker, a flatbed truck, and a fire truck. Heartland also retained discretion to place extra workers around the track if it determined that additional workers were needed. Such contractual terms may be sufficient to establish a duty of care by Heartland. See Wolfgang v. Mid-Am. Motorsports, Inc., 111 F.3d 1515, 1524 (10th Cir. 1997) (duty to third party beneficiaries may be created by contractual terms intended to secure safety of third parties). Given the inherent danger of motorcycle racing and the nature of Heartland's obligation to secure the safety of racers, Heartland is not entitled to summary judgment on the theory that plaintiff's injuries were unforeseeable and Heartland had no duty of care to prevent them.

Although SFX Motor Sports assumed primary responsibility for hiring and training corner workers, the record indicates that Heartland was also involved in employment matters. Specifically, Heartland hired the two corner workers stationed at corner 10 on the day of the accident and the emergency personnel responsible for operating the on-site ambulances. Defendants argue that these persons were independent contractors and that the defendants cannot be held liable for the negligence of such persons. Plaintiff does not address whether the corner workers and emergency personnel are employees or independent contractors. This distinction is normally a question of fact for the jury. McCubbin v. Walker, 256 Kan. 276, 281, 886 P.2d 790, 795 (1994). Such distinction, however, is irrelevant here. Plaintiff's claim is rooted in the direct negligence of Heartland and SFX Motor Sports in hiring incompetent workers; it is not premised on a theory of vicarious liability.

Under Kansas law, an employer has a duty to "hire and retain only safe and competent employees," Plains Res., Inc. v. Gable, 235 Kan. 580, 591, 682 P.2d 653, 662 (1984), and a duty to "employ a competent and careful contractor . . . to do work which will involve a risk of physical harm unless it is skillfully and carefully done." McDonnell v. Music Stand, Inc., 20 Kan. App.2d 287, 293, 886 P.2d 895, 900 (1995) (adopting Restatement (Second) of Torts § 411). The work of the corner workers and the emergency personnel clearly involved a risk of physical harm to race participants if the work was not performed correctly. The evidence reveals a genuine issue of material fact whether Heartland's hiring of inadequate corner workers and emergency personnel created a foreseeable risk of harm, and Heartland is not entitled to summary judgment on the theory that it had no duty of care under Gable and McDonnell. Heartland is not entitled to summary judgment on the ground that its agreement with SFX Motor Sports relieved it of its duty.

ii. Heartland's Agreement With GAM

Heartland also entered into an oral agreement with GAM by which Heartland delegated to GAM some of its duties under its contract with SFX Motor Sports. Specifically, GAM agreed to open the gates of the facility, prepare the bathrooms, ensure that the public address system was operational and provide water jugs during the motorcycle races. Without complete assignment of operation responsibilities, Heartland's delegation of duties to GAM through oral agreement does not insulate Heartland from an otherwise

applicable duty of care. See § Benefit Life Ins. v. Fed. Deposit Ins. Corp., 804 F. Supp. 217, 225 (D.Kan. 1992) (delegation of contractual duties to another does not discharge duty or liability of original obligor without agreement to that effect). Heartland is not entitled to summary judgment on the ground that its oral agreement with GAM relieved it of its duty.

C. Duty Owed By SFX Entertainment And Clear Channel

Although SFX Entertainment and Clear Channel were not involved in the races, plaintiff argues that they assumed a duty because they were named in the waiver which he signed. Plaintiff cites no authority for the counter-intuitive proposition that, for purposes of tort law, plaintiff creates a duty by exercising a waiver which relieves a party of liability for ordinary negligence. The record contains no evidence from which a jury might find that SFX Entertainment and Clear Channel owed any duty to plaintiff. SFX Entertainment and Clear Channel are therefore entitled to summary judgment on plaintiff's claims.

II. Negligence

Heartland and SFX Motor Sports argue that they are immune from liability for ordinary negligence

because of plaintiff's waiver.[6] Plaintiff does not respond to this argument.

Under Kansas law, the intention to waive liability for negligence must be expressed in clear and unequivocal language. Belger Cartage Serv., Inc. v. Holland Constr. Co., 224 Kan. 320, 329, 582 P.2d 1111, 1119 (1978). Here, the exculpatory language is capitalized so as to stand out from the rest of the text; the waiver is clear and unequivocal in limiting defendants' liability for ordinary negligence. Indeed, substantially similar language has been upheld against claims of ordinary negligence in the context of automobile racing. See Wolfgang v. Mid-Am. Motorsports, Inc., 898 F. Supp. 783, 788-90 (D. Kan. 1995), aff'd, 111 F.3d 1515 (10th Cir. 1997). Because the waiver clearly and unequivocally bars plaintiff's claims from ordinary negligence, Heartland and SFX Motor Sports are entitled to summary judgment on those claims.

III. Wanton Conduct

Plaintiff argues that Heartland and SFX Motor Sports acted with wanton disregard of the known and obvious risk harm at corner 10.[7] Wanton conduct

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[6] Because the Court has determined that Jayhawk, SFX Entertainment and Clear Channel owed no duty to plaintiff, it only considers plaintiff's negligence claims against Heartland and SFX Motor Sports.

[7] Because the Court has determined that Jayhawk, SFX Entertainment and Clear Channel owed no duty to plaintiff, the

(continued. .)

would be actionable because it falls outside the scope of plaintiff's waiver. See Wolfgang 898 F. Supp. at 788 (under Kansas common law, attempt to waive liability for wanton conduct unenforceable). Heartland and SFX Motor Sports argue that their conduct was not wanton because (1) they did not consider corner 10 to be dangerous, (2) they took sufficient measures to prevent injury and render aid to plaintiff, (3) they experienced no communication difficulties on the day of plaintiff's accident, and (4) the corner workers were adequately trained and equipped.

Kansas does not recognize degrees of negligence, but draws a distinction between ordinary negligence and wanton conduct. Danisco Ingredients USA, Inc. v. Kansas City Power &Light Co., 267 Kan. 760, 772, 986 P.2d 377, 385 (1999). Wanton conduct is a product of defendants' mental attitude, not of particular negligent acts. Robison v. Kansas, 30 Kan. App.2d 476, 479, 43 P.3d 821, 824 (2002). To establish wanton conduct under Kansas law, plaintiff must show defendants' realization of the imminence of danger and reckless disregard, complete indifference or lack of concern for the probably consequences of the wrongful act. Id. (citing Boaldin v. Univ. of Kan., 242 Kan. 288, 293, 747 P.2d 811, 814 (1987)).

Plaintiff may establish defendants' realization of an imminent danger with circumstantial evidence that (1) defendants had reason to believe that such a danger existed or (2) defendants disregarded a known

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[7](.continued)
Court only considers plaintiff's wanton conduct claims against Heartland and SFX Motor Sports

or obvious risk from which harm was highly likely to occur. Lanning v. Anderson, 22 Kan. App.2d 474, 482, 921 P.2d 813, 819-20 (1996). Such evidence may be used to form a legitimate inference to the requisite knowledge of defendants. Id.

Defendants' reckless disregard or complete indifference need not include an intent to injure. Reeves v. Carlson, 266 Kan. 310, 314, 969 P.2d 252, 256 (1998). Since reckless disregard and indifference are characterized by failure to act when action is called for to prevent injury, acts of omission as well as acts of commission can be wanton. Gould v. Taco Bell, 239 Kan. 564, 572, 722 P.2d 511, 518 (1986). Preventative measures will preclude a finding of wantonness only where those measures "materially lessen the chances of the injury suffered by the plaintiff." Wolfgang, 111 F.3d at 1523.

The determination that conduct is wanton is normally a question of fact for the jury. Gruhin v. City of Overland Park, 17 Kan. App.2d 388, 392, 836 P.2d 1222, 1225 (1992). "Only when reasonable persons could not reach differing conclusions from the same evidence may the issue [of wantonness] be decided as a question of law." Id. Here, the parties do not attribute specific knowledge or action to particular defendants. Because they refer only to defendants collectively, and much of the conduct of Heartland and SFX Motor Sports is intertwined, the Court cannot separately evaluate their conduct and intent. The Court therefore evaluates as a whole the conduct of Heartland and SFX Motor Sports.

While defendants admit that crashes are an inherent danger in motorcycle racing and that such crashes involve the risk of serious injury or death, they argue that they did not know of the imminence of danger in this case. The track rental agreement, the waiver and the placement of ambulances, a fire truck, fire extinguishers, radios and emergency personnel suggest that the defendants knew of these risks before plaintiff's accident. Indeed, the track rental agreement stated "motor sports activities are hazardous and participation can lead to serious or fatal injury." Exhibit N to Defendants' Memorandum at 8. This general knowledge is sufficient to support a finding that defendants had reason to know about the existence of imminent danger. See Wolfgang, 898 F. Supp. at 791. Further, at least three motorcycles ran off the racetrack at corner 10 the day before plaintiff's accident while running much slower than competition speed. The record also contains evidence that on the day of the accident while running much slower than competition speed. The record also contains evidence that on the day of the accident, during pre-race practice, at least one or more motorcycle ran off the racetrack at corner 10 while traveling slower than competition speed. Because such incidents would involve a much greater risk of harm when occurring at the higher speeds of competition, a reasonable jury could infer that the danger of corner 10 was obvious to defendants.[8] See Lanning, 22 Kan. App.2d at 482, 921,

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[8] Because the track rental agreement was operative only from August 8 through 10, 2003, the record is not clear whether SFX Motor Sports had knowledge of the three run-offs which occurred on August 7, 2003. Viewing the evidence in the light most favorable to plaintiff, however, a reasonable jury could find that

(continued)

P.2d at 820 (knowledge may legitimately inferred from circumstantial evidence). This evidence creates a genuine issue of material fact whether defendants had a realization of imminent danger sufficient to find wanton conduct. Id.

Defendants also argue that as a matter of law they did not act wantonly because they materially lessened plaintiff's risk of harm by (1) stationing two corner workers at corner 10, (2) holding training meetings with corner workers the morning and afternoon of each race day, (3) equipping corner 10 with two fire extinguishers and a radio, (4) providing two staffed ambulances and a fire truck, (5) calling a helicopter and (6) protecting the "impact zone" of the concrete barrier around corner 10 with additional safety measures. In evaluating defendants' preventative measures, the question is whether a reasonable jury could come to only one conclusion based on the facts and circumstances of the case: that defendants' actions materially lessened the risk of plaintiff being injured in his accident and the rescue operation that followed. See Wolfgang, 111 F.3d at 1523. A "token effort" at preventing injury will not overcome a mental attitude of reckless disregard. Friesen v. Chicago, Rock Island & Pac. R.R., 215 Kan. 316, 323, 524 P.2d 1141, 1148 (1974).

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[8](..continued)
Heartland, as operator and lessor of the racetrack on all pertinent days, knew of the run-offs on both August 7 and 8, 2003. A reasonable jury could also find that SFX Motor Sports knew of the run-off on August 8, 2003.

Of the two corner workers stationed at corner 10, one had no prior experience and the other was disabled and had only worked as a corner worker on a circular track (not a road course) some 20 years earlier. Heartland hired both corner workers through a temporary employment service, and did not question either corner worker about prior experience. Ritger positioned both corner workers by themselves on the inside of corner 10, which prevented them from timely reaching plaintiff, who had crashed on the outside of the track. Also, the track operators' delay in giving Linda Bodtke authorization to waive her red flag and stop the other racers prevented Randy Bodtke from quickly making his way across the track to help plaintiff. Viewing the evidence in a light most favorable to plaintiff, the corner workers were ill-prepared to help plaintiff once they arrived at the crash site; they had not received training on use of a fire extinguisher and no one tried to extinguish the flames which engulfed plaintiff.

The first ambulance arrived approximately five minutes after the accident, but the emergency personnel did not attempt to help plaintiff. It was not until th second ambulance arrived, approximately 12 minutes after the accident, that any emergency personnel began to render aid. The record contains no evidence that the fire truck ever responded to the crash site. Viewing the evidence in a light most favorable to plaintiff, a reasonable jury could find that in a situation involving obvious danger, defendants hired and relied upon unskilled, temporary workers. This evidence of reckless disregard makes summary judgment on a claim on wanton conduct improper. See

Louderback v. Orkin Exterminating Co., 26 F. Supp. 2d 1298, 1310 (D. Kan. 1998).

The Court cannot conclude as a matter of law that calling a helicopter or trying to protect the "impact zone" of corner 10 absolves defendants of liability for wanton conduct. Viewing the evidence in a light most favorable to plaintiff, defendants' overall actions exacerbated plaintiff's injuries, and a reasonable jury could find that defendants recklessly disregarded an obvious risk of imminent harm by completely failing to provide additional safety measures in a lesser impact zone of corner 10 and by failing to hire or train competent corner workers and emergency personnel.

A reasonable jury could conclude that defendants' conduct was wanton, and defendants' motion for summary judgment on this issue must therefore be overruled.

IV. Loss of Consortium

Defendants argue that they are entitled to summary judgment on plaintiff's loss of consortium claim because such claim is derivative of plaintiff's underlying claims of negligence and wantonness. See McGuire v. Sifers, 235 Kan. 368, 385, 681 P.2d 1025, 1038 (1984) (loss of consortium claim vests in spouse who suffers personal injuries); see also Wood v. City of Topeka, 90 F. Supp.2d 1173, 1196 (D.Kan. 2000) (damages for loss of consortium recoverable only where plaintiff proves underlying cause of action). To the extent that the Court has sustained defendants'

motion for summary judgment, plaintiff may not recover for loss of consortium damages. At this point, however, plaintiff's remaining claims of wanton conduct provide a basis for the loss of consortium claim. Defendants' motion for summary judgment as to plaintiff's claims for loss of consortium against Heartland Park and SFX Motor Sports is therefore overruled.

IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment (Doc. #54) filed July 17, 2006 be and hereby is SUSTAINED in part. The Court SUSTAINS defendants' motion for summary judgment as to (1) Jayhawk Racing Properties, L.L.C., SFX Entertainment, Inc., d/b/a Clear Channel Entertainment, and Clear Channel Communications, Inc. on all plaintiff's claims, and (2) Heartland Park Raceway, L.L.C. and SFX Motor Sports, Inc, d/b/a Clear Channel Entertainment-Motor Sports on plaintiff's claims of ordinary negligence. Defendants' motion is otherwise OVERRULED.

Dated this 27th day of October, 2006 at Kansas City, Kansas.

s/Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge

APPENDIX D

FILED
United States Court
of Appeals Tenth Circuit
December 7, 2009
Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ARTHUR C. WAGNER JR., individually and for the benefit of Jean Marie Wagner, Plaintiff-Appellee/ Cross-Appellant, v. LIVE NATION MOTOR SPORTS, INC., f/k/a SFX MOTOR SPORTS, INC., doing business as Clear Channel Entertainment-Motor Sports, Defendant-Appellant/ Cross-Appellee,	No. 07-3365 & 07-3366

and

HEARTLAND PARK RACEWAY, LLC,

Defendant.

ORDER

Before KELLY, EBEL, and MURPHY, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel or no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

s/Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

Supreme Court, U.S.
FILED
MAR 31 2010
OFFICE OF THE CLERK

No. 09-1038

In The
Supreme Court of the United States

ARTHUR C. WAGNER, JR., Individually
and for the benefit of Jean Marie Wagner,
Petitioner,

v.

LIVE NATION MOTOR SPORTS, INC., f/k/a SFX MOTOR SPORTS, INC., d/b/a Clear Channel Entertainment-Motor Sports; and Heartland Park Raceway, L.L.C.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

RICHARD T. MERKER
Counsel of Record
RICHMOND M. ENOCHS
PAUL M. CROKER
JAY L. MOWBRAY
WALLACE, SAUNDERS, AUSTIN,
BROWN & ENOCHS, CHTD.
10111 W. 87TH ST., PO BOX 12290
OVERLAND PARK, KS 66282
(913) 888-1000 (TELEPHONE)
(913) 888-1065 (FACSIMILE)
rtm@wsabe.com

Counsel for Respondents

March 31, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

STATEMENT OF PARTIES

Petitioner's Statement of the Parties is incorrect to the extent it states Heartland Park Raceway, LLC was a party to the appeal to the Tenth Circuit or a party to Petitioner's Petition for Writ of Certiorari. At the district court, the jury found Heartland Park Raceway, LLC was not liable for wanton conduct and Heartland Park Raceway, LLC did not appeal the judgment or any issue to the Tenth Circuit. Therefore, Heartland Park Raceway, LLC has not been a party to this action since the district court entered judgment in its favor.

RULE 29.6 DISCLOSURE STATEMENT

Live Nation Motor Sports, Inc., formerly a Texas corporation, was wholly owned by Live Nation, Inc. until it was sold on or about September of 2008 to Feld Entertainment, Inc., and is now known as Feld Motor Sports, Inc., a Delaware corporation, with its principal offices still located in Aurora, IL. Feld Entertainment, Inc. is a privately held company based out of Vienna, Virginia and it wholly owns Feld Motor Sports, Inc.

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STATEMENT OF THE CASE

The procedural posture of the case is as follows. Following discovery, and based on the release and waiver forms Petitioner had signed before the race, the district court granted Respondent and Heartland Park Raceway, LLC summary judgment on Petitioner's negligence claims. The district court granted summary judgment to the other remaining defendants on all of Petitioner's claims, because the record contained no evidence from which a jury might conclude they owed a duty to Petitioner. Petitioner has not appealed the district court's entry of summary judgment on the negligence claim or the other remaining defendants. The case went to trial solely against Respondent and Heartland Park Raceway, LLC, and solely on a theory of wanton conduct under Kansas law.

Respondent moved for judgment as a matter of law at the close of Petitioner's evidence and for judgment notwithstanding the verdict at the close of all evidence, incorporating all of the arguments set forth in its Motion for Summary Judgment in addition to the oral argument presented. The district court denied both motions. After a five-day trial, the jury returned a verdict in favor of Heartland Park Raceway, LLC and against Respondent. The jury awarded roughly $2.6 million in compensatory damages.

Following entry of judgment in accordance with the jury's verdict, Respondent moved under Fed. R. Civ. P. 50(b) for judgment as a matter of law, based on a claim of insufficient evidence to support a jury finding of wanton conduct; under Rule 59(a) for a new trial, based on a variety of grounds not ruled on by the

Tenth Circuit, and under Rule 59(e) for alteration or amendment of the judgment, again, based on grounds not ruled on by the Tenth Circuit. The district court denied the motion for judgment as a matter of law and the motion for new trial, but granted in part the motion to alter or amend the judgment. The Court then ordered entry of an amended judgment that reduced Petitioner's damages by just over a million dollars.

Respondent timely appealed to the Tenth Circuit and filed a motion asking the Tenth Circuit certify to the Kansas Supreme Court questions regarding whether comparative fault principles apply within an action based solely on a claim of wanton conduct. Petitioner filed a cross-appeal to the Tenth Circuit. The Tenth Circuit heard oral argument on Respondent's appeal and Petitioner's cross-appeal.

On November 13, 2009, the Tenth Circuit filed its decision reversing the district court's denial of Respondent's Rule 50(b) motion, vacating the jury's verdict on Petitioner's wanton conduct claim, and remanding to the district court with instructions to enter judgment as a matter of law in favor of Respondent. The Tenth Circuit did not reach the issues raised in regard to the district court's denial of Respondent's motion for new trial under Rule 59(a). Further, the Tenth Circuit dismissed Petitioner's cross-appeal as moot and Respondent's pending motion for certification to the Kansas Supreme Court was also denied as moot. Finally, Petitioner requested a Petition for Rehearing *en banc*, which the Tenth Circuit denied by written order filed on December 7, 2009. On March 1, 2010, Petitioner filed his Petition for Writ of Certiorari.

The facts of the case are as follows. The accident concerned here occurred during a motorcycle race conducted at Heartland Park Topeka in Topeka, Kansas on August 8, 2003. The accident occurred when Mr. Wagner's motorcycle left the track, traveled for approximately 250 feet, and struck a wall outside of Corner 10. Though the wall is protected for hundreds of feet by tires, Mr. Wagner's motorcycle struck the wall at a point at least 20 yards to the left of the tires, well outside of the anticipated impact zone and where no racer had ever made contact with the wall.

During the race at issue, the race officials were as follows. Kevin Elliott was Respondent's Director of Operations regarding road racing. Mr. Elliott raced motorcycles from 1980 until 1989 and has been involved in the motorcycle racing industry for twenty-eight (28) years.

William Ritger was the Safety Director and Race Control on the day of Mr. Wagner's accident. Mr. Ritger started working as a corner worker in 1989 and had ten years of experience working as Race Control and Safety Director for motorcycle races. Mr. Ritger completed a road racing school in approximately 1993.

William Fehrman was the Race Director at the time of the accident at issue. Mr. Fehrman was a law enforcement officer for over twenty-five (25) years. He started working as a Race Director in 1993 and has been a Race Director since that time. He was the Race Director for motorcycle races at Heartland Park Topeka in 1991, 1993, 1999, and 2000. Mr. Fehrman has completed a road racing school, as well as an

advanced road racing school. He participated in road races at Heartland Park Topeka in 1988 and 1989.

Gordon Spieckerman acted as the assistant to Race Control on the day of Mr. Wagner's accident. Race control is someone who monitors the conditions during a race and makes adjustments with respect to changing conditions as necessary. Mr. Spieckerman started working as a corner worker in the mid-1980s and has been acting as the same ever since that time. Mr. Spieckerman has been a member, board member, and safety director of the Midwest Café Racing Association ("MCRA"). Finally, Mr. Spieckerman is involved in the training of corner workers.

Mr. Abbott was a full-time employee of SFX with respect to the motorcycle races at issue. At the time of trial, Mr. Abbott was the manager for Michael Jordan Motor Sports. Prior to Mr. Wagner's accident, Mr. Abbott had participated in pro, semi-pro, and amateur motorcycle races for over ten (10) years and competed at the highest level of motorcycle racing in the United States, AMA Super Bike level. Mr. Abbott has been involved in the motorcycle racing industry for over twenty (20) years.

All of the race officials testified there was plenty of distance, approximately 250 feet, between the track and the wall at issue to be considered safe. No racer or track official had ever expressed concern about the wall at issue. The racers, including Mr. Wagner, were given the opportunity the day before the accident and just prior to the subject race to complete several practice sessions on the track. These practice runs provided the racers with an opportunity to inspect the track and report any areas of concern as they were

required to do pursuant to the release the racers signed prior to the practice sessions and the subject race.

Further, the race officials and six professional racers inspected the track, and all of them felt the wall at Corner 10 was properly protected by a tire wall, which was located in the impact zone and some testified the tire wall extended past industry standards. Heartland Park met the safety standards set by the Federation Internationale De Motocyclisme[1] ("FIM") and Federation Internationale De L' Auto obile[2] ("FIA").

In preparing for the race, race officials placed portions of 27-foot long "air fence," air-filled crash attenuation devices, around the track locations they deemed the most dangerous, the likely "impact" areas, some of which were only 10 to 15 feet off the racetrack in comparison to the approximately 250 feet Petitioner travelled before striking the wall at issue. An air fence was not placed at Corner 10 because it was further back from the track, no rider had previously hit the

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[1] The FIM is the governing body of motorcycle racing, the sanctioning body for 90 national motorcycle federations, and involved in many non-racing activities that promote the sport, its safety, and support relevant public policy. It also makes rules and codes in regards to motorcycle racing. See http://www.fim.ch/en/default.asp

[2] The FIA is a non-profit association, rule making body, and a sanctioning body which brings together 213 national motoring organizations from 125 countries on 5 continents. The FIA makes policies and adjudges violations. They sponsor/sanction several racing organizations/leagues and make rules for these racing leagues as well. See http://www.fia.com/index_800.html.

wall there, and there was sufficient run-off space allowing "a lot of opportunity to get the bike under control." Additionally, that portion of the wall was not considered to be an impact area because it was "so far past the apex of the corner" the adjacent portion of the track was more of a straightaway.

Race officials agreed that you do not put air fence on straightaways. If a motorcycle were out of control, it would most likely occur prior to reaching the apex point. At the apex, a bike is likely to be back under control, but even from the apex the trajectory would still project a rider into the tires. Therefore, the race officials did not expect a rider would hit the wall where Mr. Wagner's motorcycle struck.

There were corner workers located at each turn along the track. The corner worker position required the individual to watch the track, notify the control tower of any problems, and display flags to the racers as necessary. Race officials testified the corner worker position is "not a highly trained or specialized position," but "a very simple position with very simple rules and regulations and very simple operating procedures."

A training session was held every morning prior to the races, where the workers were given a demonstration by two different trainers on how to use their flags and other equipment. The corner workers who worked at Corner 10 testified they were well-trained, their duties were explained to them, and any questions were answered. Each corner worker station was provided with a radio to communicate with the control tower, and an official explained how to use the radio to identify any problems and to get assistance

because of an accident. Each corner worker was also given supplies to assist in picking up debris and given a fire extinguisher. A brochure was also provided to workers as a quick reference guide. In addition, the race officials arranged for two ambulances and a fire suppression truck to be present at the race track.

Mr. Wagner had been racing for 18 years, and has raced at Daytona and Loudon, where he admitted there was a lot of unprotected concrete around those racetracks. Further, plaintiff's own expert witness, Russell Darnell, agreed that other more famous tracks, such as Daytona and Indianapolis 500, had concrete all the way around the corners, those tracks were certified safe, and he approved the use of run-off areas and admitted it is not always possible to eliminate barriers. Along those same lines, race officials testified it was impossible to protect every area of the race track.

Mr. Wagner left the racetrack at Turn 10 where the corner workers at Corner 10, Randy and Linda Bodtke, were stationed. As soon as Mr. Wagner left the track, corner workers called the control tower to inform race officials of the accident and they instructed them to wave the red flag. Further, Mr. Bodtke testified that as soon as Mr. Wagner left the track, he grabbed the fire extinguisher and crossed the race track when it was safe to do so, because he was trying not to put him or other racers in danger as he was trained. Mr. Bodtke got to the site of the accident within less than a minute and could hear the ambulance approaching. A fire suppression truck also arrived, spraying chemical around the site.

The corner worker from Corner 11 got to Mr. Wagner before Mr. Bodtke did and was spraying the area in which Mr. Wagner was located. Mrs. Bodtke eventually arrived on the scene and saw a white substance on Mr. Wagner's back; however, the paramedics came and turned Mr. Wagner over onto his back so no one could see the white substance. Multiple witnesses testified the corner workers performed their jobs well. Petitioner's own expert witness agreed that, based on the corner workers' testimony, they did what they were trained and expected to do.

A life flight helicopter arrived shortly thereafter and took Mr. Wagner to KU Medical Center for additional treatment. Mrs. Bodtke testified that Mr. Bodtke and the corner worker from corner 11 got to Mr. Wagner very quickly and extinguished the fire. In fact, she testified everyone responded very quickly, within a minute, including an ambulance and fire suppression truck.

The safety director for the race at issue, who had worked at Daytona, kept a radio log that reflects the pertinent times involved. The radio log states: at 3:56, a bike and rider were down at Corner 10 and the tower immediately called for a red flag around the track; at 4:17, a helicopter flight was called for and at 4:40, Mr. Wagner arrived at the KU Medical Center in Kansas City. Race officials testified the response to the accident was very fast, especially by the ambulance.

REASONS TO DENY PETITION

The case set forth in Wagner's Petition for Writ of Certiorari is a far cry from the evidence submitted to the jury at trial and the arguments made to the Tenth

Circuit. Petitioner presents three questions to this Court all of which are without merit. Petitioner argues that (1) his Fifth Amendment right to due process was violated, (2) the Tenth Circuit failed to follow Kansas law as required by 28 U.S.C.A. § 1652 in issuing its decision, and (3) his Seventh Amendment right to a jury trial was violated.

The Panel's Decision does not Violate the Fifth Amendment.

Petitioner's argument that the decision of the Tenth Circuit panel of judges that decided this case (the "Panel") violated the Fifth Amendment with respect to due process requirements flies in the face of well-established case law. Petitioner's argument regarding the Fifth Amendment is nothing short of an attempt to create a constitutional issue out of thin air and crosses over well into the realm of frivolous.

Petitioner is attempting to argue the Panel's alleged improper decision has deprived Petitioner of the judgment he was awarded or property without due process despite the fact that the asserted deprivation of property occurred through the appellate process of the federal courts. Petitioner fails to cite any law on point with respect to this argument, because it is completely devoid of any merit and is contrary to the long-standing rule of law on this point.

The federal courts have clearly held that,

> The basic requisites of due process when applied to judicial proceedings are that, having due regard to the form and nature of the proceeding and the character of the rights

> which may be affected, the order, judgment, or decree be entered by a court clothed with jurisdiction of the subject matter and that the party or parties bound by it have notice and be afforded an opportunity to present every available defense. An order, judgment, or decree entered in such circumstances does not violate the due process clause even though it be erroneous in fact or law, or both.

State of Kansas, ex rel. Beck v. Occidental Life Ins. Co., 95 F.2d 935, 937 (10th Cir. 1938); *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701 (1884); *Holden v. Hardy*, 169 U.S. 366 (1898); *Endicott Johnson Corp. v. Encyclopedia Press*, 266 U.S. 285 (1924); *Dohany v. Rogers*, 281 U.S. 362 (1930); *Powell v. Alabama*, 287 U.S. 45 (1932); *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373 (1933); *Owens v. Battenfield*, 33 F.2d 753 (8th Cir. 1929); *Cf. Burks v. Wisconsin Dept. of Transp.*, 464 F.3d 744, 759 (2006) (" . . . we have previously rejected arguments that summary judgment violates either the Fifth or Seventh Amendments.").

In the present case, Petitioner does not assert the Panel violated any of these due process requirements applicable to judicial proceedings. Specifically, Petitioner does not allege (1) the Panel violated any Federal Rules of Appellate Procedure, (2) the Panel was without jurisdiction to decide the appeal, (3) Petitioner was without notice of the appeal, and (4) Petitioner was not given an opportunity to raise every argument he had in opposition to the appeal.

Rather, Petitioner actually (1) filed a brief in opposition to the issues raised by Respondent on

appeal, (2) filed a brief in support of his cross-appeal, (3) filed a reply brief regarding his cross-appeal, (4) appeared for oral argument before the Panel and (5) requested a rehearing *en banc* before the Tenth Circuit. In other words, "[t]he proceeding involved here was in due form; the court had jurisdiction of the subject matter; and the [Petitioner] had notice and [was] heard", which satisfied the full measure of the exactions of due process. *Id.*

Petitioner argues the Panel simply reached the wrong decision in issuing its opinion. Petitioner's assertion is incorrect for the reasons stated below; however, even if it is assumed for the sake of argument that the Panel's decision in this case was wrong, a ruling that is "erroneous in fact or law, or both" does not violate the due process requirements of the Fifth Amendment where the above stated criteria are met. *Id.* at 937. There is no dispute that the due process requirements required by the Fifth Amendment were met with respect to the appeal decided by the Panel. Therefore, Petitioner's argument that the Panel's decision violated the due process requirements of the Fifth Amendment fails to find support in fact or law. Accordingly, this Court should deny Petitioner's Petition for Writ of Certiorari.

The Tenth Circuit Complied with 28 U.S.C.A. § 1652 in Issuing Its Decision.

Petitioner makes the erroneous assertion that the Panel "disregarded its statutory obligation under 28 U.S.C.A. § 1652 to apply . . ." the law of Kansas. However, quite the opposite is true. The Panel correctly stated and applied Kansas law regarding

wanton conduct as stated by the Supreme Court of Kansas.

In support of this invalid assertion, Petitioner primarily argues that the Panel did not consider the Tenth Circuit's decision in *Wolfgang*. This assertion is untenable, because Judge Kelly, a member of the Panel, sat on the panel of judges that decided *Wolfgang* and Judge Kelly authored the *Wolfgang* decision. *Wolfgang v. Mid-American Motorsports, Inc.*, 111 F.3d 1515 (10th Cir. 1997). Furthermore, the Panel cited *Wolfgang* in its decision in the present case. *Wagner v. Live Nation Motor Sports, Inc.*, 586 F.3d 1237, 1242 and 1246 (2009). Furthermore, *Wolfgang* was decided by the Tenth Circuit, not an appellate court of Kansas and, therefore, *Wolfgang* is not binding precedent on the Tenth Circuit. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996) ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.") As a result, even if the Panel did not consider *Wolfgang*, which it did, this alleged omission does not constitute reversible error.

Further, the Panel accurately stated Kansas law regarding wanton conduct as pronounced by the Supreme Court of Kansas in *Bowman*, *Robison*, *Friesen*, *Reeves*, *Gould*, and *Lanning*. *Wagner*, 586 F.3d at 1244-1246; *Bowman v. Doherty*, 686 P.2d 112 (Kan. 1984); *Robison v. State*, 43 P.3d 821 (Kan. Ct. App. 2002); *Friesen v. Chicago, Rock Island & Pac. R.R.*, 524 P.2d 1141 (Kan. 1974); *Gould v. Taco Bell*, 722 P.2d 511 (Kan. 1986); *Reeves v. Carlson*, 969 P.2d 252 (Kan. 1998); *Lanning ex rel Lanning v. Anderson*, 921 P.2d 813 (Kan. Ct. App. 1996). That is, under Kansas law "a plaintiff must make a two-pronged

showing: (1) that the act was 'performed with a realization of the imminence of danger'; and (2) that the act was performed with a 'reckless disregard [of] or complete indifference to the probable consequences of the act." *Wagner*, 586 F.3d at 1244 *quoting Reeves v. Carlson*, 969 P.2d 252, 256 (Kan. 1998).

Moreover, the Panel correctly stated the rule enunciated by the Supreme Court of Kansas in *Friesen* in the context of this case as follows: "'a token effort' to prevent the harmful consequences of staging a motorcycle race 'would not avoid liability' for wanton conduct, but 'definite acts which materially lessen the chances of' such consequences *would* avoid liability." *Wagner*, 586 F.3d at 1247 quoting *Friesen*, 524 P.2d at 1148. (emphasis original).

Further, Petitioner complains about the Panel's analysis of the alleged wanton conduct. The Panel found that the courts of Kansas had analyzed allegations of wanton conduct in both a specific and general manner and, therefore, the Panel analyzed the allegations of wanton conduct in a specific and general manner to the benefit of Petitioner. *Wagner*, 586 F.3d at 1245. The Panel applied the aforementioned two-part inquiry to the risks associated with the seven allegations of wanton conduct specified by Petitioner and to the broad risk associated with staging a motorcycle race. *Wagner*, 586 F.3d at 1246-1248. In the end, the Panel properly found no matter how it viewed the risks associated with the motorcycle race, specific or broad, there simply was no evidentiary basis for a finding of wanton conduct especially in light of the many safety precautions taken by Respondent. *Id.*

Interestingly, Petitioner does not specifically discuss any of the Supreme Court of Kansas' cases on which the Panel relied in reaching its unanimous decision in the present case. Further, Petitioner accuses the Panel of "invent[ing] a new principle of law that had never been contemplated by Kansas courts and then appl[ying] that newly discovered principle in an arbitrary and irrational manner . . ." (Petitioner's Brief, at 7).

Petitioner's assertion is fatally flawed because when the Panel set forth the law regarding wanton conduct the Panel quoted directly from the decisions of the Supreme Court of Kansas. It would seem impossible to invent a principle of law while at the same time quoting from binding Kansas precedent. Perhaps Petitioner's decision not to discuss the binding precedent on which the Panel relies is based on the fact that he cannot put into words how the binding precedent cited by the Panel allegedly invents a new standard never contemplated by the appellate courts of Kansas and how the Panel irrationally applied the same without making such naked and unsupported accusations. In any event, Petitioner's assertion that the Panel disregarded its statutory obligation under 28 U.S.C.A. § 1652 to apply the law of Kansas is without merit.

Finally, while the Panel found that Petitioner met the first prong necessary to establish wanton conduct, the Panel properly applied "the *Friesen* rule regarding preventative measures . . ." to ". . . easily conclude that Wagner failed to put on evidence based upon which a reasonable jury could have found that SFX acted wantonly rather than merely negligently." *Wagner*, 586 F.3d at 1247. In other words, the Panel

appropriately found Petitioner failed to meet the second prong necessary to establish wanton conduct i.e. ". . . that the act was performed with a 'reckless disregard [of] or complete indifference to the probable consequences of the act.'" *Wagner*, 586 F.3d at 1247 quoting *Reeves*, 969 P.2d at 256.

As a result, the Panel was correct in its holding that there was not a legally sufficient evidentiary basis in the record to support a claim of wanton conduct under Kansas law. Accordingly, the question presented by Petitioner under 28 U.S.C.A. § 1652 fails to establish a reason for this Court to grant Petitioner's Petition for Writ of Certiorari.

The Panel's Decision does not Violate the Seventh Amendment.

At first blush, Petitioner's argument that the Panel's decision in this matter violated his Seventh Amendment right to a jury trial appears to have the potential to hold water. However, once the argument is explored past the surface, one quickly realizes the dam has given way.

It is difficult to determine exactly what Petitioner's argument is with respect to the Seventh Amendment. At times, it appears Petitioner is arguing that a directed verdict under any circumstances violates the right to a jury trial under the Seventh Amendment. This Court has heard this argument before and dismissed it as follows:

> If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of

> evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. [Citations omitted]. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. Cf. Rule 50; Berry v. United States, 312 U.S. 450, 61 S.Ct. 637, 85 L.Ed. 945. The objection therefore comes too late.

Galloway v. U.S., 319 U.S. 372 (1943).

Further, Petitioner does not state the applicable standard of review regarding the district court's review of a denial of Respondent's motion for directed verdict, nor does Petitioner take the position the Panel failed to state the correct standard of review. Petitioner's silence on the Panel's statement of the standard of review speaks volumes.

Not only did the Panel accurately state the applicable standard of review, the Panel properly applied and adhered to the same during the development of their rationale and through the statement of their ultimate conclusion. Therefore, Petitioner's complaint under the Seventh Amendment is nothing short of a fallacy. Petitioner cannot avoid the fact that, "nothing in the Seventh Amendment removes the appellate court's duty to correct errors of law . . . ," which is exactly what the Panel found and corrected in the present case. *Ballwanz v. Isthmian Lines, Inc.*, 319 F.2d 457 (4th Cir. 1963) *citing Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 366 (1962) (dissenting on other grounds).

The Panel stated the applicable standard of review as follows:

> A party is entitled to JMOL only if the court concludes that "all of the evidence in the record . . . [reveals] no legally sufficient evidentiary basis for a claim under the controlling law." (citations omitted). Drawing all reasonable inferences in favor of the nonmoving party, which in this case is Wagner, we thus will reverse the district court's denial of the motion for JMOL "if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion" (citation omitted). It is not our province to "weigh evidence, judge witness credibility, or challenge the factual conclusions of the jury." (citation omitted).

Certainly, Petitioner cannot argue that the Panel failed to state the correct standard of review. However, Petitioner makes an attempt to argue the Panel disregarded the standard of review. This endeavor fails because the Panel strictly followed the standard of review and Petitioner's arguments are based on mere conclusory statements and unsupported assertions.

Petitioner argues the Panel ignored evidence upon which the district court relied in denying Respondent's motions for directed verdict. However, this statement is simply incorrect. The Panel expressly discussed the evidence upon which the district court relied in denying Respondent's motions and explained in detail the legal basis for its conclusion that the district court committed error. *Wagner*, 586 F.3d at 1246-1248. The

Panel expressly stated in its written opinion that, it considered all of the evidence in the record. *Wagner*, 586 F.3d at 1248. Further, the Panel acknowledged that the jury was "within its rights to believe little, or indeed, none of the sworn testimony" favorable to Respondent. *Wagner*, 586 F.3d at 1246; *quoting Wagner v. SFX Motor Sports Inc.*, 522 F. Supp. 2d 1330, 1339 (D. Kan 2007); *see Reeves v. Sanderson Plumbing Prods*, 530 U.S. 133, 151 (2000).

The Panel found that the evidentiary record did not provide a legally sufficient evidentiary basis to find that Respondent realized the imminent danger alleged by Petitioner, regardless of whether it was viewed narrowly or broadly, and, therefore, the Panel need not look further to see if Respondent was completely indifferent to the alleged imminent danger. However, the Panel did look further and determined the safety precautions that Respondent took to materially lessen the chances of harmful consequences arising from Respondent staging the motorcycle race allowed the Panel to easily conclude "that Wagner failed to put on evidence based upon which a reasonable jury could have found that SFX acted wantonly rather than merely negligently." *Wagner*, 586 F.3d at 1247.

Specifically with respect to the alleged realization of danger regarding Corner 10, the Panel stated that,

> ". . . while the jury was free to disregard or doubt the credibility of SFX's employees and former employees who testified that they were aware of no previous crashes at Corner 10 and that they had no reason to believe that the concrete wall in question would be an impact area, the jury was not free to infer SFX's

> knowledge of damage from an absence of evidence on the issue."

Wagner, 586 F.3d at 1247-1248 (emphasis original). The Panel's review of the entire record lead them to find that, "Wagner offered no evidence that SFX knew or should have known of the danger posed by the configuration of Corner 10." *Wagner*, 586 F.3d at 1248. Further, the Panel found that even if Wagner had put on such evidence the safety precautions taken by SFX established that SFX was not completely indifferent to that danger.

Petitioner's assertions that the Panel disregarded evidence and misapplied Kansas law are simply wrong. Therefore, Petitioner's issue regarding the alleged violation of his Seventh Amendment right to a jury trial fail to provide a reason for this Court to grant Petitioner's Petition for Writ of Certiorari.

MISREPRESENTATIONS MADE BY PETITIONER

Petitioner shamelessly makes numerous misrepresentations regarding the facts of this case and the holdings of this Court and the Supreme Court of the State of Kansas, as well as with respect to the Tenth Circuit's ruling in the present case. Respondent identifies these misrepresentations for the Court pursuant to Supreme Court Rule 15.2.

Many of Petitioner's representations of the case law he cites are analogous to an attempt to put a square peg in a round hole. The representations do not match up with the actual holdings of the cases.

For instance, Petitioner cites *Hollingsworth* for the rule that, "Circuit Courts of Appeal are not free to ignore their own rules." *Hollingsworth v. Perry*, _____ U.S. _____, 130 S.Ct. 705 (2010). *Hollingsworth* has no bearing on the present case, because the case at hand does not involve the Tenth Circuit's amendment of a federal procedure or local rule mandated by federal law, nor did the Panel take any action that resembles the act of the court in *Hollingsworth*.

It appears Petitioner is asserting the rule the Panel ignored was the decision in *Wolfgang*. Even if the Tenth Circuit Panel at issue did not consider the *Wolfgang* decision, *Wolfgang* is not binding Kansas precedent and, therefore, perhaps Petitioner forgot the Panel was free to not consider *Wolfgang*. *Gasperini*, 518 U.S. at 427. The parties stipulated in the Pretrial Order that Kansas substantive law governed this case and, therefore, the Panel was only required to consider and apply the relevant case law published by the appellate courts of Kansas.

Further, Petitioner cites *Hayes Sight & Sound, Inc.* with respect to the definition of "wanton conduct;" though that case does not provide a definition of "wanton conduct," let alone the definition asserted by Petitioner. *Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 136 P.3d 428 (Kan. 2006). Petitioner also cites *Cerretti* regarding "wanton conduct." *Cerretti v. Flint Hills Rural Elec. Coop. Ass'n*, 251 Kan. 347, 366, 837 P.2d 330 (1992). While *Cerretti* at least contains a definition of "wanton conduct," it does not provide the definition stated by Petitioner. *Id.*

In addition, *Hawkinson* does not state "Kansas law permits a finding of wanton conduct with respect to

one wrongful act even though other wrongful acts of the defendant might fall short of wanton conduct" as Petitioner represents to this Court. *Hawkinson v. Bennett*, 962 P.2d 445 (Kan. 1998). Rather, *Hawkinson* holds that a jury may find wanton conduct under one legal theory, i.e. breach of fiduciary duty, and not another legal theory i.e. tortious interference. The applicable rule regarding Respondent's argument to the Tenth Circuit, which the Panel did not reach, is an appellate court "must reverse if" a district court erroneously submits one of two or more issues to the jury and "'it cannot be determined whether the jury relied on the improper ground'." *Brown v. Wal-Mart Stores, Inc.*, 11 F.3d 1559, 1566-1567 (10th Cir. 1993), citing *Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1299 (10th Cir. 1989).

Further, Petitioner misconstrues the holding in *Resolution Trust Corporation* for the proposition that "[u]nder Kansas law a tort plaintiff has a vested property right in existing rules of law that cannot lawfully be impaired through modification of rules of law without affording due process." *Resolution Trust Corporation v. Fleischer*, 257 Kan. 360, 892 P.2d 497 (1995). In *Resolution Trust Corporation*, the Supreme Court of Kansas addressed "whether the legislature [could] retroactively change a common-law duty of care, thereby eliminating an accrued and pending tort cause of action." *Id.* at 366-367. The *Resolution Trust Company* case defines "accrual of a cause of action" as "the right to institute and maintain an action for enforcement." *Id.* at 367.

Resolution Trust Company is not applicable to the present case. First, the Court clearly states, "[o]ur answers to the certified questions are based on and

limited to the facts and circumstances in the instant case." *Id.* at 366. Further, the Panel is clearly not a legislative body and they did not enunciate a new common-law duty and apply it retroactively, thereby eliminating Petitioner's ability to assert his cause of action against Respondent.

Further, *Marshall* involves the duty owed to a patron of exhibitors, not the duty owed to a participant in the exhibition itself, as Petitioner represents to this Court. *Marshall v. Heartland Park Topeka*, 274 Kan. 294, 298-299, 49 P.3d 501 (2002).

Petitioner also makes numerous misrepresentations regarding the facts of the case and the events that have taken place to date in this matter. For instance, Petitioner would have this Court believe that Petitioner and Respondent agreed "in their district court briefs and their appellate briefs," *Wolfgang* was the "most relevant precedent" and the trial judge was of the same opinion. Petitioner's representations are simply false.

Respondent distinguished *Wolfgang* on the facts and with respect to the issue of comparative fault. For example, at the hearing on the parties motions *in limine* counsel for Respondent stated,

> No, I don't think there are any cases on point. We radically disagree that *Wolfgang* is on all fours because the real difference in *Wolfgang* is the Plaintiff in *Wolfgang* admitted he was negligent and they did not claim anything that was a result of his negligent acts on. The claims were only for the failure to extricate him from the vehicle in *Wolfgang*. That is why I [said]

> *Wolfgang* [is] totally distinguishable from this case.

(Aplt. App., V. 5, p. 1325). In light of this statement and others by Respondent, it is impossible to understand how Petitioner believes Respondent agreed *Wolfgang* was the most relevant case or controlling precedent.

Further, the trial judge told counsel for Petitioner during the same hearing,

> And specifically my concern is that even as you propose to limit your claim, it would not come within the realm of what the *Wolfgang* claimant had done and that is going to be deemed as a matter of law materially distinguishable for purposes of appeal.

(Aplt. App., V. 2, p. 1316). Moreover, the trial judge's order on the parties' motions *in limine* distinguished the *Wolfgang* case from the present case. (Aplt. App., V. 4). For instance, the order stated, ". . . the court is inclined to find *Wolfgang* factually distinguishable, or at a minimum that Plaintiff reads the case too broadly." (Aplt. App., V. 4, pp. 969). Clearly, the trial court did not recognize *Wolfgang* as all controlling precedent. No where in the district court's memorandum order on Respondent's post-trial motions does the district court proclaim *Wolfgang* was the most relevant case or controlling precedent. (Aplt. App., V. 4, pp. 1234-1261).

While Petitioner clearly believed and argued the relevance of *Wolfgang*, Respondent argued in its briefs to the district court pre- and post-trial, at oral

argument before the district court, and in its briefs to the Tenth Circuit and at oral argument that *Wolfgang* was not controlling precedent. Petitioner simply misrepresents Respondent's and the district court's positions with respect to the *Wolfgang* case.

Moreover, Respondent distinguished *Wolfgang* based on the facts. Respondent argued as follows in its Motion for Summary Judgment and continued to assert these factual distinctions through oral argument to the Tenth Circuit.

> The race in *Wolfgang* involved sprint cars that have a unique design and have an increased risk of fire due to the use of methanol fuel, which is highly flammable. (*Wolfgang*, 898 F.Supp. at 785, 791). The plaintiff (in *Wolfgang*) alleged that the firefighters were not properly trained and equipped with respect to accidents involving specially designed sprint cars and extrication of racers from the same and, as a result, plaintiff remained in his burning car for eight (8) to ten (10) minutes. *Id.* at 791; *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515 (10th Cir. Kan. 1997). Specifically, the plaintiff alleged that the defendants' lack of knowledge regarding the "release mechanism present on the steering wheel and a fuel line that ran through the cockpit" constituted wanton conduct. *Id.* at 791. In the present case, those issues simply do not exist. The increased risk of fire because of the use of methanol was nonexistent in the motorcycle race at issue. Further, the accident in this case involved a motorcycle and, therefore, there was no need for the firefighters

> to be trained with respect to a specially designed vehicle or extrication procedures regarding the same. Moreover, the corner workers that responded to Mr. Wagner's accident were properly trained and equipped to aid Mr. Wagner. In addition, the plaintiff in *Wolfgang* alleged that the defendants did not have a sufficient number of firefighters at the practice session for the sprint car race. *Id.* at 791.
>
> In this case, it is uncontroverted that at the time of the accident the corner stations closest to where Mr. Wagner's accident occurred were staffed, and there were two (2) ambulances and a fire suppression truck on the premises. (SUF Nos. 46 and 47). Further, the relevant Defendants believed that they had a sufficient number of corner workers and that they were adequately trained to execute their duties.

(Aplt. App., V. 1, pp. 38-39).

Furthermore, at oral argument before the Tenth Circuit, Respondent argued that the present case was not *Wolfgang*, and explained the factual distinctions between the two cases. Further, the evidence presented in this case was not more one-sided than the evidence presented in *Wolfgang* as Petitioner asserts for the reasons set forth above. In fact, in *Wolfgang* there was at least an argument that evidence of wanton conduct existed whereas in this case there was none.

Petitioner goes so far as to say the Panel did not "explain why [*Wolfgang*] was not controlling precedent

. . ." (Pet. Brief, at 8). It would appear to Respondent that the Panel did not need to state that *Wolfgang* was not controlling precedent because it is black letter law in a diversity case where state law applies the only decisions that constitute controlling precedent are those opinions published by the state's appellate courts, which constitute the substantive law of the state. *Gasperini*, 518 U.S. at 427. Certainly, Petitioner is not taking the position that the appellate courts of Kansas have not published opinions regarding wanton conduct in light of the case law cited in the Panel's decision.

The Panel did not reach the arguments raised in Petitioner's cross-appeal; however, that did not stop Petitioner from arguing in his Petition to this Court that the district court's application of the noneconomic damage cap pursuant to Kansas law was a remittitur. Petitioner's argument with respect to remittitur finds no support in fact, law or reality and is absolutely frivolous.

Further, Petitioner's assertion that the racetrack workers made no attempt to douse the flames that consumed his clothing is incorrect. The evidence at trial established that the corner workers responded to the accident very quickly and attempted to put out the fire on and around Petitioner and his motorcycle.

In addition, Petitioner misrepresents the stipulation Respondent entered into prior to trial regarding the wall outside of Corner 10. The written stipulation actually stated as follows:

1. Heartland Park Raceway, LLC had control over the barrier outside of Turn 10 with which Plaintiff allegedly collided.

2. The barrier outside of Turn 10 with which Plaintiff allegedly collided could be moved with the proper equipment.

(Aplt. App., V. 3, p. 797).

Further, Plaintiff represents to this Court that the jury found specific acts of wanton conduct. The jury was not presented with special interrogatories and, therefore, the jury did not make any specific findings regarding wanton conduct.

Finally, it appears that Petitioner is taking the position that Heartland Park Raceway, LLC was a party to the appeal to the Tenth Circuit and a party to Petitioner's Writ of Certiorari to this Court. Heartland Park Raceway, LLC did not appeal the judgment or any issue decided at the district court level and, therefore, Heartland Park Raceway, LLC has not been a party to this case since the U.S. District Court of Kansas entered judgment in favor of it shortly after the jury rendered its verdict.

CONCLUSION

Put simply, the Petition for Writ of Certiorari does not present this Court with a legal issue that has any merit. The Panel properly reversed the district court's denial of Respondent's Rule 50(b) motion, vacated the jury's verdict in favor of Petitioner, and remanded to the district court with instructions to enter judgment as a matter of law in favor of Respondent. For all the

reasons set forth above, this Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully Submitted,

Richard T. Merker
Counsel of Record
Richmond M. Enochs
Paul M. Croker
Jay L. MowBray
WALLACE, SAUNDERS, AUSTIN,
BROWN & ENOCHS,
CHARTERED
10111 W. 87th St., PO Box 12290
Overland Park, KS 66282
(913) 888-1000 (Telephone)
(913) 888-1065 (Facsimile)
rtm@wsabe.com
rme@wsabe.com
pcroker@wsabe.com
jmowbray@wsabe.com

Counsel for Respondents

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